Petition

No. 81-827

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.,

Petitioner,

v.

ABBOTT LABORATORIES, A CORPORATION; CIBA-GEIGY CORPORATION, A CORPORATION, D/B/A CIBA PHARMACEUTICAL COMPANY; AMERICAN CYANAMID CO., A CORPORATION, D/B/A LEDERLE & LABS. DIVISION; PARKE-DAVIS & CO., A CORPORATION; CHARLES PFIZER & CO., INC., A CORPORATION, FORMERLY KNOWN AS E. R. SQUIBB & SONS, INC., D/B/A SQUIBB PHARMACEUTICAL COMPANY; THE UPJOHN CO., A CORPORATION; AMERICAN HOME PRODUCTS CORP., A CORPORATION, D/B/A WYETH LABORATORIES AND D/B/A AYERST LABORATORIES; BURROUGHS WELLCOME & CO. (U.S.A.), INC., A CORPORATION; BRISTOL-MYERS COMPANY, A CORPORATION, D/B/A BRISTOL LABORATORIES; MERCK SHARP & DOHME ORTHOPEDICS COMPANY, INC., A CORPORATION; HOFFMAN-LA ROCHE, INC., A CORPORATION; G. D. SEARLE & CO., A CORPORATION, D/B/A SEARLE LABORATORIES; TRAVENOL LABS, INC., A CORPORATION, D/B/A FLINT LABORATORIES; THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, D/B/A UNIVERSITY OF ALABAMA HOSPITAL PHARMACY AND RUSSELL AMBULATORY CENTER PHARMACY; COOPER GREEN HOSPITAL, A NON-PROFIT CORPORATION, D/B/A COOPER GREEN HOSPITAL PHARMACY; ABC CORP. AND XYZ CORP., WHOSE IDENTITIES ARE UNKNOWN AT THIS TIME TO THE PLAINTIFFS, BUT WILL BE ADDED BY AMENDMENT WHEN ASCERTAINED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Are sales made to state and local government agencies exempt *per se* from the proscriptions of the Robinson-Patman Act where those agencies are competing in the public market place with privately owned business enterprises?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 31, 1981.

OPINION BELOW

The Court of Appeals for the Fifth Circuit affirmed judgment and opinion of the United States District Court for the Northern District of Alabama without opinion on the basis of the memorandum of opinion entered by the United States District Court for the Northern District of Alabama. The judgment of the Court of Appeals is not yet reported. (Appendix "A") The Honorable Thomas A. Clark, Circuit Judge, authored a dissenting opinion which is not yet reported. (Found at Appendix "B")

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered on August 31, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF CASE

1. Proceedings in District Court

This suit was brought by the Jefferson County Pharmaceutical Association, Inc., a non-profit corporation which is comprised of pharmacists throughout Jefferson County, Alabama. The suit alleged that fifteen different drug manufacturers (named above) were selling drugs to the University of Alabama Pharmacy and Russell Ambulatory Center Pharmacy and Cooper Green Hospital Pharmacy at discriminatory "bid prices" and that these pharmacies operated as agencies of the State of Alabama

and of Jefferson County were selling drugs procured by "bid purchasing" to the general public in direct competition with privately owned pharmacies. Plaintiff's complaint further alleged that sales by these pharmacies are in violation of the Robinson-Patman Act, 15 U.S.C. § 13. The plaintiff in its complaint sought both injunctive relief and monetary damages for compensation of the alleged injuries because of violation of the proscriptions of the Robinson-Patman Act.

All defendants filed motions to dismiss plaintiff's complaint, stating as grounds for dismissal, among other things, that sales of goods made to a governmental agency or instrumentality are exempt as a matter of law from the sanctions of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13. The District Court held "that governmental purchases are, without regard to 15 U.S.C. § 13c, beyond the intended reach of the Robinson-Patman Price Discrimination Act . . . ." The district court accepted the argument of the defendants that since sales to governmental institutions were not specifically treated by the explicit exemption found in 15 U.S.C. § 13c, that there exists an *implicit* exemption for sales to governmental agencies irregardless of whether or not they have entered the retail pharmacy business in direct competition with private enterprise.

2. Proceedings in the Court of Appeals

The Jefferson County Pharmaceutical Association, Inc., appealed the decision of the District Court and the Court of Appeals for the Fifth Circuit affirmed the decision of the District Court without opinion. The Honorable Thomas A. Clark dissented and filed an opinion stating that the decision of the majority was

in conflict with *Abbott Laboratories v. Portland Retail Druggists, Inc.*, 425 U.S. 1, 96 S.Ct. 1305 (1976).

REASONS FOR GRANTING THE WRIT

1. This case merits review by this Court on Certiorari because the decision of the Court of Appeals in affirming the judgment and opinion of the District Court is in direct conflict with the holding of the Supreme Court in *Abbott Laboratories v. Portland Retail Druggist Association, Inc.*, 425 U.S. 1, 96 S.Ct. 1305, 47 L.Ed.2d 537 (1976).

2. This case merits review by this Court on Certiorari because the issue presented herein, whether sales to governmental agencies or instrumentalities are *per se* exempt from the proscriptions of the Robinson-Patman Act, is one of first impression.

3. This case merits review by this Court on Certiorari because the decision of the Court of Appeals is an unjust decision in that it permits the State of Alabama and its agencies to unfairly compete with private enterprise in the operation of retail pharmacies.

ARGUMENT

The only guiding precedent in this case is a decision by this Honorable Court in *Abbott Laboratories v. Portland Retail Druggists Association, Inc.*, 425 U.S. 1, 96 S.Ct. 1305, 47 L.Ed.2d 537 (1976), wherein this Court held that drug purchases by nonprofit hospitals which were later dispensed by the hospital pharmacies were not *per se* exempt from the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13. Rather, that nonprofit institutions must adhere to the proscriptions of the Robinson-Patman Act except when purchases are made

by the nonprofit institution for its own use as provided for in the *limited* exemption provision of the Nonprofit Institutions Act, 15 U.S.C. § 13c. In *Portland Retail Druggists, supra,* this Honorable Court looked to the conduct of the hospitals in question and held that when hospitals act as competitors and purchase for retail resale, those hospitals were entitled to no exemption. *Portland Retail Druggists* is indistinguishable from this case except for the fact that the hospitals and hospital pharmacies in question are owned by the State of Alabama and a subdivision of the State of Alabama.

This Honorable Court further stated in *Portland Retail Druggists* that the Robinson-Patman Act was enacted "to curb and prohibit all devices by which large buyers gained discriminatory preferences over small ones by virtue of their greater purchasing power." *FTC v. Broch & Company,* 363 U.S. 166, 168, 4 L.Ed.2d 1124, 80 S.Ct. 1158 (1960); *FTC v. Fred Meyere, Inc.,* 390 U.S. 341, 349, 19 L.Ed.2d 1222, 88 S.Ct. 904 (1968). *Abbott Laboratories v. Portland Retail Druggists, supra,* 47 Lawyers Edition 2d 537, at p. 548.

The antitrust laws and, in particular, the Robinson-Patman Act should be construed liberally and the exceptions and exemptions from their application must be construed strictly. *United States v. McKesson and Robbins,* 351 U.S. 305, 316, 100 L.Ed. 1209, 76 S.Ct. 937 (1956); *FMC v. Sea Train Lines, Inc.,* 411 U.S. 726, 733, 36 L.Ed.2d 260, 93 S.Ct. 1773 (1973); *Perkins v. Standard Oil Co.,* 95 U.S. 642, 646 through 647, 23 L.Ed.2d 599, 89 S.Ct. 1871 (1969); *Abbott Laboratories v. Portland Retail Druggists, supra,* 47 L.Ed.2d, at page 547, 548.

In view of these holdings it is clear that the appellate court's creation of an implicit exemption is erroneous.

The Court of Appeals has looked to the absence of treatment of governmental institutions within the Robinson-Patman Act and "found" an implied immunity or exemption for the defendant hospitals and hospital pharmacies based solely on their existence as a subdivision of the State of Alabama. It is well settled that implied antitrust immunity and exemption is not favored but, rather, that there is a heavy presumption against implicit exemption from application of the antitrust laws. *Abbott Laboratories v. Portland Retail Druggists Association, Inc., supra,* 47 L.Ed.2d 537, at page 548.

The exemption provided by congress was clearly intended for the benefit of nonprofit institutions allowing them to operate at the lowest possible cost, so long as they did not compete with private enterprise. This is clear from the legislative history of the act as evidenced by the testimony of H. B. Teegarden, the author of the Robinson-Patman Act. The questions and testimony of Mr. Teegarden taken from the *hearing,* at page 208 in pertinent part are as follows:

> MR. LLOYD. Would this bill, in your judgment, prevent the granting of discounts to the United States Government?
>
> MR. TEEGARDEN. Not unless the present Clayton Act does so. So far as that problem is concerned, it is no different from that which exists under the present Clayton Act.
>
> MR. LLOYD. For instance, the Government gets huge discounts. Take that electric fan, for instance. You go to the ordinary store and the list price is $35. The Procurement Division procures them delivered, one at a time, for $13.18. Now, would that discount be barred by this bill?
>
> MR. TEEGARDEN. I do not see why it should, unless a discount contrary to the present bill would

be barred—that is, the present law—would be barred by that bill.

Aside from that, my answer would be this: The Federal Government is not in competition with other buyers from these concerns. Therefore a discrimination—it is so applied universally in interstate commerce law, in the railroad law—to have a discrimination, there must be a relative position between the parties to the discrimination which constitutes an injury to one as against the other. I think the answer is to be found in that.

In other words, if seller A makes a price to a retailer in New York and a different price to a retailer in San Francisco, all other things aside, no case of discrimination could be predicated there, because the two are not in the same sphere at all.

The Federal Government is saved by the same distinction, *not of location but of function. They are not in competition with anyone else who would buy.* [Emphasis added.]

MR. HANCOCK. It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

MR. TEEGARDEN. You mean competitive bidding on Government orders?

MR. HANCOCK. Government, State, city, municipality.

MR. TEEGARDEN. No; I think not.

MR. MICHENER. If it did do it, you would not want it, would you?

MR. TEEGARDEN. No; I would not want it. It certainly does not eliminate competitive bidding anywhere else and I do not see how it would with the Government.

MR. HANCOCK. You would have to bid to the city, county, exactly the same as anybody else; same quantity, same price, same quality?

MR. TEEGARDEN. No.

MR. HANCOCK. *Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?*

MR. TEEGARDEN. I would have to answer it this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. *If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill. If they are not in competition with each other, then they are in a different sphere.*

The facts of the situation are not present upon which to predicate a discrimination, in the nature of the case. I do not see that that question becomes any different under this bill from what it is under the present section 2 of the Clayton Act, for that bill also prohibits discrimination generally in the same terms that this does. But it differs in the breadth of the exceptions. That is the only difference between the two bills.

Hearings before the House Committee on the Judiciary on Bills to amend the Clayton Act, 74th Congress, 1st Session, pp. 208-09.

The decision by the Court of Appeals places the businessmen who operate pharmacies in competition with the University Hospital Pharmacy, Russell Ambulatory Center Pharmacy and Cooper Green Hospital Pharmacy in a grossly inequitable position without a remedy. Certainly, the private businesses operated as pharmacies, almost all of which are individually owned

by the plaintiff association's members, are placed at a great disadvantage by requiring them to compete for their livelihood with the awesome purchasing power of the State of Alabama. This is in conflict with 15 U.S.C. § 13 and *Portland Retail Druggists, supra,* which would require the institution seeking exemption to act as a consumer rather than as a competitor.

Respectfully submitted,

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Appendix

APPENDIX A

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.,
Plaintiff-Appellant,

v.

ABBOTT LABORATORIES, et al.,
Defendants-Appellees.

No. 79–1150.

United States Court of Appeals,
Fifth Circuit.

Aug. 31, 1981.

Appeal from the United States District Court For the Northern District of Alabama.

Before VANCE, FRANK M. JOHNSON, Jr. and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

AFFIRMED on the basis of the district court's Memorandum of Opinion dated

December 1, 1978, a copy of which appears as an appendix hereto.

AFFIRMED.

THOMAS A. CLARK, Circuit Judge, will file a dissenting opinion at a subsequent date.

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.,	)	
Plaintiff,	)	
-vs-	)	NO. CA 78-P-0870-S
ABBOTT LABORATORIES, et al.,	)	
Defendants.	)	

MEMORANDUM OF OPINION

Abbott Laboratories v. Portland Retail Druggists Ass'n, 425 U.S. 1, 96 S.Ct. 1305, 47 L.Ed.2d 537 (1976), held that 15 U.S.C. § 13c did not exempt from the Robinson-Patman Price Discrimination Act, 15

U.S.C. § 13, drug purchases by nonprofit hospitals which were later dispensed by the hospital pharmacies (1) to staff, employees, and students of the hospital (other than for the personal use of themselves or of their dependents), (2) to "walk-in" customers, or (3) as refills to former patients. The basic question in this case, presented on motions to dismiss, is whether a violation of the Robinson-Patman Act can be premised upon such purchases when made by hospitals operated by an agency or subdivision of a state.

It is alleged in the complaint that local retail pharmacies have been injured by virtue of lower prices being charged by drug manufacturers to competing pharmacies operated in conjunction with the county hospital and with the hospitals and clinics of the Medical College of the state university. The plaintiff—a trade association to which the claims of its member pharmacies have been assigned—is seeking injunctive relief and treble damages against fifteen drug manufacturers and against the governmental bodies which operate the "favored" pharmacies. For purposes of the motions to

dismiss,[1] it must be assumed that the allegations of the complaint are correct and, moreover, that at least some of the governmental purchases would be beyond the exemption described in *Abbott Laboratories, supra.*

I.

A preliminary question is whether the plaintiff association can maintain the action either in its own right or in its capacity as assignee, a matter not raised in *Abbott Laboratories, supra.*

The award of treble damages is limited to injured parties, *Brunswick Corp. v. Pueblo-Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977); and the fact of injury is critical to the establishment of the cause of action, *Alabama v. Bluebird Body Co.*, 573 F.2d 309 (CA5 1978). Here, the claimed injuries are not those of the association itself, nor are they such as would be shared in

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1. One of the defendant manufacturers has moved for summary judgment on the alternative basis that it made no sales to the plaintiff's assignors and members. This issue is discussed in Part IV, *infra.*

common and in equal degree by plaintiff's entire membership. *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). It appears therefore that the plaintiff cannot maintain this action in its own right either for damages or for injunctive relief. See *Buckley Towers Condominium, Inc. v. Buchwald*, 533 F.2d 934 (CA5 1976), *cert. denied*, 429 U.S. 1121, 97 S.Ct. 1157, 51 L.Ed.2d 571 (1977); *Burleigh House Condominium, Inc. v. Buchwald*, 546 F.2d 57 (CA5 1977), *cert. denied*, 433 U.S. 909, 97 S.Ct. 2975, 53 L.Ed.2d 1093 (1977); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 (CA9 1975), *cert. denied*, 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d 204 (1976).

While acknowledging that antitrust claims can be validly assigned, e. g., *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (CA5 1975), defendants assert that the plaintiff should here be treated as a mere "agent" for collection under the rule stated in *Archie v. Shell Oil Co.*, 110 F.Supp. 542 (E.D.La.1953), *aff'd per curiam*, 210 F.2d 653 (CA5 1954), *cert. denied*, 348 U.S. 843, 75 S.Ct. 64, 99 L.Ed. 665 (1954). *Cf. California*

League of Independent Insurance Producers v. Aetna Casualty and Surety Co., 175 F.Supp. 857 (N.D.Cal.1959). At this stage of the case,[2] however, there is no reason to hold the alleged assignments ineffective with respect either to the damage claims or to the claims for injunctive relief. See *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 (CA9 1975), *cert. denied*, 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d 204 (1976); 3A Moore's Federal Practice, ¶ 17.09[1.—1]. It should be noted, moreover, that even if defendants' assertions as to the real parties in interest should be later upheld, the court would under F.R.Civ.P. Rule 17(a) provide an opportunity for joinder or substitution of the plaintiff's assignors.

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2. Attached to defendant's brief is a copy of one of the assignments, which appears to be sufficient as an assignment for collection. Legal consideration for the assignments may well be provided by virtue of the fact that the various assignors are entitled thereunder to a pro rata distribution of recoveries in the action.

II.

One[3] of the defendants—the Board of Trustees of the University of Alabama—asserts that it is immune from this action by virtue of the Eleventh Amendment. In part the court agrees.

The status of the Board under applicable state constitutional, legislative, and decisional law is remarkably similar to that analyzed in *Jagnandan v. Giles*, 538 F.2d 1166 (CA5 1976) *cert. denied*, 432 U.S. 910, 97 S.Ct. 2959, 53 L.Ed.2d 1083 (1977). The claims against the Board must therefore be treated as equivalent to claims against the State itself. *Cf. Hander v. San Jancinto Junior College*, 519 F.2d 273 (CA5 1975).

Nor has there been a waiver of that immunity, or implied consent to be sued; for the state engaged in the activities complained of—whether viewed as opera-

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3. It is not clear whether The Cooper Green Hospital also asserts immunity under the Eleventh Amendment. What is clear is that it is entitled to such immunity neither for the period when it was operated by the county commissioners under the name Mercy Hospital nor for the period it has been operated under the provisions of Alabama Code (1975), §§ 22-21-70 *et seq.*

tion of a university, as providing of hospital services, or as purchasing of goods—before enactment of the federal legislation and, moreover, that legislation contains no clear expression of intent that state conduct be subject to the private remedies therein provided. See *Intracoastal Transportation, Inc. v. Decatur County*, 482 F.2d 361 (CA5 1973).

The constitutional immunity, however, bars only the claims for damages, and not the request for prospective injunctive relief which is also urged by the plaintiff. See *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Jagnandan v. Giles, supra*. Accordingly, the Eleventh Amendment does not provide a basis for dismissal of all the claims made against the Board.

III.

The central issue is whether sales to governmental agencies are subject to the proscriptions of the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13. Whether considered as involving the scope of the Act or an implied exemption from the Act, the question is essentially one of statutory construction in the light

of Tenth Amendment implications. There are no appellate court decisions directly on point. The question is a close one.

Four major considerations support the plaintiff's position that governmental purchases are subject to the Act. (1) Governmental agencies are not, merely by reason of such status, exempt from the anti-trust laws. *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978). (2) The Robinson-Patman Act is to be construed liberally, with exceptions thereto construed strictly and implied exemptions therefrom disfavored. *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 96 S.Ct. 1305, 47 L.Ed.2d 537 (1976). (3) The statutory language—"persons" and "purchasers"—is sufficiently broad to cover governmental bodies. 15 U.S.C. §§ 12, 13(a, f). (4) An explicit exemption is provided for certain purchases. 15 U.S.C. § 13c. The plaintiff argues that trial court rulings holding Robinson-Patman inapplicable to governmental purchasers have not received appellate approval and are effectively overruled by the later Supreme Court decisions on related questions. Curiously,

the plaintiff in its brief makes a concession that Robinson-Patman would not be violated if favored governmental purchasers were to give away the purchased items.[4]

As the defendants argue, both *Abbott Laboratories* and *Louisiana Power* can be distinguished from the case *sub judice*. The Supreme Court in *Abbott Laboratories* was concerned with sales to non-governmental hospitals and, indeed, noted without criticism that the trial court had dismissed counts based on sales to governmental hospitals "for failure to state a claim." 425 U.S. at 4, n. 2, 96 S.Ct. at 1309. *Louisiana Power*, on the other hand, involved claims under the Sherman Anti-trust Act, legislation in which Congress was "exercising the full extent of its constitutional power." 435 U.S. at 398, 98 S.Ct. at 1129. *Cf. Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974) (Robinson-Patman more restricted in scope than

4. It is unclear whether plaintiff would consider the nonremunerative distribution by a governmental agency as being "for its own use" under 15 U.S.C. § 13c, or as being outside the "commerce" and "competition" standards of 15 U.S.C. § 13, or as meeting some implied exemption in the law.

Sherman). Moreover, the activities challenged in *Louisiana Power* had been undertaken volitionally by the municipalities, independent of any state directive or policy, whereas in the present case the questioned conduct—acquisition of goods by governmental bodies at the most favorable prices available—involves not only state policy, but state mandates.[5]

It may, however, be a mistake to place great emphasis upon these distinctions. After all, the breadth of language used in the majority opinions of both *Abbott Laboratories* and *Louisiana Power* hardly

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5. See Alabama Code (1975), §§ 41–16–20, 41–16–21. Applicability of similar restrictions to counties and county hospitals under Article 3 of Chapter 16 of Title 41 of the Alabama Code (1975) is less clear. *Cf.* Alabama Code (1975) § 22–21–190 (bid laws made applicable to some county hospitals). It may be argued that the state policy is not to require that lower prices be given to governmental purchasers than to private purchasers, but only that the governmental purchaser buy at the lowest price offered; and this is certainly so. It is, however, perhaps of significance that the state bid laws contain exceptions for sales made in violation of the Sherman Anti-trust Law but not for those contrary to Robinson-Patman. See Alabama Code (1975), §§ 41–16–25, 41–16–55.

supports the notion of any broad exemption from Robinson-Patman for state agencies and subdivisions. Indeed, the opinion of the Court in *Louisiana Power* at two footnotes seemingly rejected such an exemption[6] and cited with apparent approval earlier decisions which had subjected governmental bodies to other federal statutes prohibiting preferential treatment.[7]

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6. See 435 U.S. at 397, n. 14, 98 S.Ct. at 1128 (treating 15 U.S.C. § 13c as creating an exemption for certain municipal service operations); 435 U.S. at 402, n. 19, 98 S.Ct. at 1131 (viewing the Elkins Act, from which a governmental exemption had earlier been rejected, as similar to Robinson-Patman).

7. The referenced decisions, *Union Pacific R. Co. v. United States*, 313 U.S. 450, 61 S.Ct. 1064, 85 L.Ed. 1453 (1941), and *California v. United States*, 320 U.S. 577, 64 S.Ct. 352, 88 L.Ed. 322 (1944), may perhaps themselves be distinguished because the federal legislation involved, the Elkins Act and the Shipping Act of 1916, respectively, related to the very instrumentalities and facilities of commerce and transportation. A third cited case, *Ohio v. Helvering*, 292 U.S. 360, 54 S.Ct. 720, 78 L.Ed. 1467 (1934), involved a state activity (distribution of alcoholic beverages) clearly falling outside the parameters of traditional governmental functions.

In contending that governmental purchases are beyond the intended reach of Robinson-Patman, the defendants cite interpretations to that effect expressed prior to enactment by its chief draftsman and reiterated over a period of the following four decades by its chief sponsor, by other commentators, by government officials, and by all the courts that have addressed the question. Moreover, defendants say, the continued declination by Congress to provide for inclusion of such purchases in the face of these virtually unanimous interpretations although at least twice provided with a call to do so, argues against a judicial expansion of the Act at this late date. See *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 199–201, 95 S.Ct. 392, 400–401, 42 L.Ed.2d 373 (1974); *Flood v. Kuhn*, 407 U.S. 258, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972); *FTC v. Ruberoid Co.*, 343 U.S. 470, 478–79, 72 S.Ct. 800, 805–806, 96 L.Ed. 1081 (1952); *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 351–52, 61 S.Ct. 580, 581–582, 86 L.Ed. 881 (1941).

During consideration by the House Judiciary Committee of the proposed legislation, H. B. Teegarden—described by Representative Patman as the author of the bill—explained that it would not re-

quire bidding to cities and counties on the same basis as to private purchasers and again that, absent express provisions, it would not prevent competitive bidding on governmental purchases below trade price levels.[8] See *Hearings Before House Committee of the Judiciary on Bills to Amend the Clayton Act*, 74th Cong., 1st Sess. 209, 250 (1935). No contrary expression of opinion during the legislative history of the Act has been cited to the court.

Representative Patman has twice expressed the opinion that the Act which he co-sponsored did not apply to sales to governmental institutions. See Patman, The Robinson-Patman Act (1938), p. 168; Patman, Complete Guide to the Robinson-Patman Act (1963), p. 30.

Other texts have similarly concluded that sales to governmental agencies are beyond the scope of the Robinson-Patman Act. See Rowe, Price Discrimination Un-

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8. But for his reliance on principles of statutory construction, Mr. Teegarden's statements could be understood as premised upon the fact that governmental purchases would not typically have a potential effect upon competition.

der the Robinson-Patman Act (1962), pp. 83–84; 3 Von Kalinowski, Antitrust Laws and Trade Regulation (1978), § 24.-06[2]; 5A Cavitch, Business Organizations, § 105D.01[8][b, c].

The Attorney General of the United States, who has responsibilities in the enforcement of the Act, has from the outset taken the position that there was an implied governmental exemption. See 38 Op. Att'y Gen. 539 (1936) (citing long-standing practice under the predecessor statute and principles of statutory construction). This view was reaffirmed by Attorney General Kennedy in 1962 in his Report under Executive Order 10936 on Identical Bidding in Public Procurement and in 1973 by the Comptroller General of the United States, 1973–2 CCH Trade Cases ¶ 74,642. Similar decisions with respect to state agencies were reached in 1937 by the Attorneys General of Minnesota and Wisconsin and in 1977 by the Attorney General of North Carolina.[9]

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9. Contrary conclusions were reached in 1937 by the Attorney General of California and in 1949 by the Attorney General of Georgia, the latter however considering only the question of whether there could be proscribed discrimination in *sales by* a state factory.

Every judicial decision on the question has held the Robinson-Patman Act inapplicable to governmental purchases. Reviewing appellate courts have never disapproved such rulings. *General Shale Products Corp. v. Struck Construction Co.*, 37 F.Supp. 598 (W.D.Ky.1941), *aff'd on other grounds*, 132 F.2d 425 (CA6 1942), *cert. denied*, 318 U.S. 780, 63 S.Ct. 857, 87 L.Ed. 1148 (1943); *Sachs v. Brown-Forman Distillers Corp.*, 134 F.Supp. 9 (S.D.N.Y.1955), *aff'd per curiam on basis of district court opinion*, 234 F.2d 959 (CA 2 1956), *cert. denied*, 352 U.S. 925, 77 S.Ct. 221, 1 L.Ed.2d 160; *Logan Lanes, Inc. v. Brunswick Corp.*, Civil Action No. 4–66–5 (unpublished opinion, D. Idaho, May 26, 1966), *aff'd on other grounds*, 378 F.2d 212 (CA9 1967), *cert. denied*, 389 U.S. 898, 88 S.Ct. 219, 19 L.Ed.2d 216 (1967); *Portland Retail Druggists Ass'n v. Abbott Laboratories*, Civil Action No. 71–543 (unpublished opinion, D.Ore., September 11, 1972), *remanded on other issues*, 510 F.2d 486 (CA 9 1974), *remanded on other issues*, 425 U.S. 1, 96 S.Ct. 1305, 47 L.Ed.2d 537 (1976). Also see *Sperry Rand Corp. v. Nassau Research & Development Associates, Inc.*, 152 F.Supp. 91 (E.D.N.Y.1957) (disclaiming any ruling that denied existence of governmental exemption); *Ran-*

gen, Inc. v. Sterling Nelson & Sons, Inc., 351 F.2d 851 (CA9 1965) (any governmental exemption not applicable merely because ultimate consumer would be a government); *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 1974–1 CCH Trade Cases ¶ 75,054 (D.Utah 1974) (governmental exemption not applicable merely because ultimate consumer would be a government); *Mountain View Pharmacy v. Abbott Laboratories*, Civil Action No. C–77–0094 (unpublished order, D. Utah, August 15, 1977) (consent by plaintiffs to dismiss with prejudice of Robinson-Patman claims based on sales to governmental agencies).

During this period of accord that governmental purchases were outside the scope of the Robinson-Patman Act, legislation was twice introduced to amend the Act to bring those transactions within its coverage. See H.R. 4452, 82nd Cong., 1st Sess. (1951); H.R. 3377, 83rd Cong., 1st Sess. (1953). The proposed amendments were not enacted by Congress. There is no indication that Congressional inaction was in any way premised upon a belief that such legislation was unnecessary to impose such coverage.

A key question is what significance to give to the enactment of The Nonprofit Institutions Act, 52 Stat. 446, which in 1938 exempted from Robinson-Patman certain purchases by "schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit." 15 U.S.C. § 13c. It can be argued that Congress intended that only such purchases by universities and hospitals as satisfied the requirements of this explicit exemption were to be outside the scope of the Robinson-Patman Act. Or it can be argued that the amendment was intended to treat such purchases by non-profit private institutions as satisfied the requirements of the explicit exemption in like manner as those of governmental institutions by reason of an existing implicit exemption. The court is inclined to accept the latter interpretation as more probably correct.

At no point during the sparse legislative history is mention made of any intent that the proposed amendment affect governmental institutions of the types listed. The reports of the House Judiciary Committee, Reports 1769 and 2161, 75th Cong., 3rd Sess. (1938), described the bill as one for the exemption of "eleemos-

ynary institutions", a term commonly understood as referring to charitable bodies supported by private gifts, rather than taxes. *Cf. The Society for the Propagation of the Gospel in Foreign Parts v. New Haven*, 21 U.S. (8 Wheat) 464, 5 L.Ed. 662 (1823). In support of the need for legislation, the report included a letter from an association of voluntary non-profit hospitals, explaining how such institutions relieved burdens that otherwise would be borne by federal, state and municipal bodies. It is hardly likely that Congress would have intended to treat eleemosynary institutions more favorably than similar facilities operated by governmental bodies. Nor does it appear likely that Congress by enacting 15 U.S.C. § 13c intended to treat purchases for governmental hospitals, libraries and schools more favorably than those for other traditional governmental uses, such as for police, fire, prison, streets, poorhouse, etc. The only rational answer is that, when it passed in 1938 the exemption for certain purchases by non-profit institutions, Congress did so in the belief—as stated by Representative Patman in his text of the same year—that governmental purchases were already beyond the scope of the Act.

As stated at the outset of this discussion, the question as to applicability of Robinson-Patman to governmental purchases is a close one. On balance, however—and while aware of the disfavor which must meet claims of implied limitations on the scope of, or of implied exemptions from, the antitrust laws—the court agrees here with the defendants; namely, that governmental purchases are, without regard to 15 U.S.C. § 13c, beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes.

Additional support for this conclusion can be found in the Tenth Amendment and in *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). In *National League*, the Supreme Court held an explicit attempt by the federal government to extend the provisions of the Fair Labor Standards Act to states and their political subdivisions to be beyond the authority conferred by the Commerce Clause, at least as applied to "areas of traditional governmental functions." 426 U.S. at 852, 96 S.Ct. at 2474. Overruling *Mary-*

land v. Wirtz, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968), the Court held that this constitutional limitation would likewise apply with respect to wages paid to employees of governmental hospitals and schools. 426 U.S. at 855, 96 S.Ct. at 2475. The policy considerations discussed in *National League*, resulting in rejection of a federal statute specifying minimum prices to be paid by governmental bodies for labor comparable to that required of private institutions, appear to be no less cogent when deciding whether another federal statute should be interpreted to specify minimum prices to be paid by governmental bodies for goods comparable to that required of private institutions.[10]

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10. The court does not here base its decision upon the "state action" doctrine as explicated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975); and *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978). That doctrine appears to be limited to situations involving a "state policy to displace competition with regulation or monopoly public service." 435 U.S. at 413, 98 S.Ct. at 1136. The rationale, however, of those decisions may well support the result here reached, where a state has declared its desire

[footnote continued]

IV.

One of the defendants—Burroughs Wellcome Co.—has in the alternative moved for summary judgment. It asserts by the affidavit and deposition of its Sales Administration Manager that it has made no sales to any of plaintiff's assignors or to any of the defendant pharmacies, confining its sales in this area rather to local independent wholesalers (and the federal government) without requirements as to the terms and conditions of resale. These matters stand uncontroverted by the plaintiff, which does not actively oppose the motion. Under the circumstances Burroughs would have no liability to the plaintiff even if there were no governmental exemption from Robinson-Patman. See *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407

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that governmental purchases be on the basis of the lowest prices available. Whether some expansion of the *Parker* principle might be allowed with respect to the state policy here involved need not be answered at this time; for, as indicated, the court has concluded as a matter of statutory construction that governmental purchases are outside the reach of the Robinson-Patman Act.

F.2d 4 (CA5 1969), *cert. denied*, 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177 (1969); *A & M Stores, Inc. v. Hiram Walker, Inc.*, 427 F.2d 167 (CA5 1970). *Cf. Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).

This the 1st day of December, 1978.

/s/ Sam C. Pointer, Jr.

United States District Judge

APPENDIX B

DISSENTING OPINION

August 31, 1981

No. 79-1150

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.,
Plaintiff-Appellant,

v.

ABBOTT LABORATORIES, ET AL.,
Defendants-Appellees.

THOMAS A. CLARK, Circuit Judge, dissenting:

I respectfully dissent. The majority sanctions the defendant wholesale drug companies' violations of the Robinson-Patman Act, 15 U.S.C. § 13.[1] Further, the

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[1]The Robinson-Patman Act, ch. 592, 49 Stat. 1526 (1936), amended certain provisions of the Clayton Act, ch. 323, 38 Stat. 730 (1914). The amended product is codified at 15 U.S.C. § 13, the pertinent provisions of subsection (a) are as follows:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption or resale within the United States . . ., and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

decision permits the six states of this circuit and their agencies to unfairly compete with private enterprises operated by their citizens in the retail sale of goods. A state's size gives it great purchasing power and thus an awesome competitive advantage over private business. To this the court adds the advantage of a license to make use of price discrimination in its wholesale purchases.

The majority admits that this is a close case. It reaches its conclusion by creating an exemption not contained in the statute. This is contrary to the congressional scheme which was a response to economic conditions existing when the Act was passed. Further, the result contradicts the congressional intent clearly reflected at hearings when the Act was under consideration. Lastly, the decision does not follow the only guiding precedent of the Supreme Court, *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U.S. 1, 96 S.Ct. 1305 (1976).

Instead of creating an exemption to the statute, I would follow the policy underlying the antitrust laws. I would hold that, for the purposes of the Robinson-Patman Act, when a state moves outside its traditional sphere of activity and into retail competition with private enterprise, it should be treated in precisely the same manner as its competitors. Today's decision subverts the policy behind the Robinson-Patman Act. It subjects businessmen, who suddenly have found themselves in competition with pharmacies owned by the State of Alabama, to the unfortunate effects of unfair competition without affording them a remedy. This result is not only inequitable, it is in direct conflict with the language and major thrust of the Act.

The statute makes it unlawful for the defendant wholesale drug companies "to discriminate in price

between different purchasers of commodities . . . where such commodities are sold for use, consumption or resale . . ., and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . .".[2] The district court dismissed the complaint filed by the Jefferson County Pharmaceutical Association, which alleged that the defendant drug companies were selling to the state hospital at lower wholesale prices than to them, that such commodities were resold by the state hospital pharmacies at retail, and that these sales substantially lessened competition among the retail drug businesses in the county. As will be discussed subsequently, the federal and state governments are not covered by the statute when purchasing for consumption. The majority has taken this non-coverage of governments in the Act and has called it an exemption. It then reasons that the exemption permits resale and consequently, a lessening of competition. To me this reasoning is unfathomable. Even if this argument were valid, the Supreme Court in *Portland Retail Druggists* has clearly announced that such permitted purchases for consumption may not be extended to the sale at retail to consumers in competition with private enterprises.

When Congress had under consideration the Robinson-Patman Act, some members raised the question of the effect of such legislation upon purchases by governments. Congressional members at the hearings wanted to make certain that the federal government would not be limited by the Act when purchasing goods. Congress assumed, as evidenced at the hearings on the Act, that the government is not in competition when it is purchasing goods

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[2] 15 U.S.C. § 13(a).

for its own consumption.[3] Any similar construction to be inferred in favor of state-supported activities, therefore, would hold true only so long as the state is functioning as a consumer rather than as a competitor.[4]

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[3]This is illustrated in testimony before the House Judiciary Committee by H. B. Teegarden, the author of the Robinson-Patman Act. Part of the questioning is especially enlightening:

> MR. LLOYD. Would this bill, in your judgment, prevent the granting of discounts to the United States Government?
>
> MR. TEEGARDEN. Not unless the present Clayton Act does so. So far as that problem is concerned, it is no different from that which exists under the present Clayton Act.
>
> MR. LLOYD. For instance, the Government gets huge discounts. Take that electric fan, for instance. You go to the ordinary store and the list price is $25. The Procurement Division procures them delivered, one at a time, for $13.18. Now, would that discount be barred by this bill?
>
> MR. TEEGARDEN. I do not see why it should, unless a discount contrary to the present bill would be barred—that is, the present law—would be barred by that bill.
>
> Aside from that, my answer would be this: The Federal Government is not in competition with other buyers from these concerns. Therefore a discrimination—it is so applied universally in interstate commerce law, in the railroad law—to have a discrimination, there must be a relative position between the parties to the discrimination which constitutes an injury to one as against the other. I think the answer is to be found in that.
>
> In other words, if seller A makes a price to a retailer in New York and a different price to a retailer in San Francisco, all other things aside, no case of discrimination could be predicated there, because the two are not in the same sphere at all.
>
> The Federal Government is saved by the same distinction, *not of location but of function. They are not in competition with anyone else who would buy.* [Emphasis added.]

Brief of Appellees Abbott Laboratories, et al., at 66, *quoting Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act*, 74th Cong., 1st Sess., 208-09 (hereinafter cited as Hearings).

[4]Indeed, the author of the Robinson-Patman Act expressly advised members of the House Committee that anti-competitive

[footnote continued]

Thus, Congress construed the Act as not covering purchases for government consumption. However, a

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purchasing and resale by municipal hospitals would be covered by the Act. When pressed to explain how far state and local government liability would extend under the Act, Teegarden offered the only testimony to be found in the consideration of the Act that is directly relevant to the question we decide:

MR. HANCOCK. It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

MR. TEEGARDEN. You mean competitive bidding on Government orders?

MR. HANCOCK. Government, State, city, municipality.

MR. TEEGARDEN. No; I think not.

MR. MICHENER. If it did do it, you would not want it, would you?

MR. TEEGARDEN. No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

MR. HANCOCK. You would have to bid to the city, county, exactly the same as anybody else; same quantity, same price, same quality?

MR. TEEGARDEN. No.

MR. HANCOCK. *Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?*

MR. TEEGARDEN. I would have to answer it this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. *If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill. If they are not in competition with each other, then they are in a different sphere.*

The facts of the situation are not present upon which to predicate a discrimination, in the nature of the case. I do not see that that question becomes any different under this bill from what it is under the present section 2 of the Clayton Act, for that bill also prohibits discrimination generally in the same terms that this does. But it differs in the breadth of the exceptions. That is the only difference between the two bills.

[footnote continued]

purchase for *retail resale* is a completely different animal from a purchase for *consumption*. In the instant case, the state government is in competition with private enterprise. Therefore the rationale behind the majority's "governmental exemption" is inapplicable.[5]

Brief of Appellees Abbott Laboratories, et al., *quoting Hearings, supra* note 3, at 209 (emphases added).

This exchange is all the more noteworthy for the majority's complete failure to rationalize its conclusion with today's decision. The opinion of the lower court, upon which the majority relies, does not distinguish this discussion. From the testimony just quoted, the conclusion is inescapable that the Act's author believed that hospital retail competition by state instrumentalities would be subject to the anti-price discrimination provisions of the Robinson-Patman Act.

The lower court's reliance on only part of Teegarden's testimony, and its apparent ignorance of the testimony just quoted, is therefore puzzling. Counsel for the appellant association informed us at oral argument, however, that this discussion with Rep. Hancock, which so clearly bears on the issue before us, was not cited to the lower court by appellees and was not known to the appellant at the time of hearing before the lower court, and indeed the lower court concluded that "[n]o contrary expression of opinion during the legislative history of the Act has been cited to the court." *Id.* I note only that this might explain the lower court's failure to discuss this very important testimony. The majority's failure to correct this omission in *their* opinion's discussion of the legislative history, however, is to me a complete mystery.

[5]The federal government is exempted from liability for anti-competitive retail activities on the principle of sovereign immunity. Teegarden commented in a letter to the Committee that the Clayton Act, as it was proposed to be amended by the Robinson-Patman bill, does not include the United States within § 13's use of the word "purchaser." That being the case, well-established principles of sovereign immunity would narrowly limit the sovereign's exposure to suit, precluding it altogether in the event of ambiguity. Teegarden's letter read in part:

2. Would the bill prevent competitive bidding on government purchases below trade price levels?

[footnote continued]

The Nonprofit Institutions Act, an amendment to the Robinson-Patman Act,[6] provides an exemption from the Robinson-Patman Act for non-profit organizations making purchases for their own use. Recently, the Supreme Court has interpreted the Nonprofit Institutions Act as not applying to privately-owned hospitals when operating outside their "intended institutional operation." *Portland Retail Druggists*, 425 U.S. at 14, 96 S.Ct. at 1314 (1976). The present case is indistinguishable from *Portland Retail Druggists* except for the fact that the hospitals in question are owned by the State of Alabama. In *Portland Retail Druggists* the Supreme Court looked to the policy behind the antitrust laws.

This question was raised by a member of the committee at the hearing. The answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives, or privileges of the sovereign unless it so expressly provides—a principle inherited by American jurisprudence from the common law. (*Dollar Savings Bank v. United States* (1874), 19 Wall. 227; 22 L.Ed. 80; *United States v. Herron* (1874), 20 Wall. 251; 22 L.Ed. 275; *Magdalen College case*, 11 Coke 74; *King v. Allen*, 15 East 333; Maxwell on Interpretation of Statutes, 6th Ed. (Eng.), p. 244-251.)

Brief of Appellees Abbott Laboratories, et al., at 28 *quoting Hearings, supra* note 3, at 250.

Never to my knowledge, however, has it been understood to be a principle of sovereign immunity that one sovereign may avail itself of the immunity from suit of another, especially when the latter is exercising a power delegated to it by the former. This rationale is therefore of no relevance to state activities otherwise prohibited by the Robinson-Patman Act.

[6]The Nonprofit Institutions Act, ch. 283, 52 Stat. 446 (1938), is codified at 15 U.S.C. § 13c and provides as follows:

Nothing in section 13 . . . of this title [15], shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

When the hospitals in question acted as *competitors* instead of *consumers*, the Court ruled that no Nonprofit Institutions Act exemption applied. Since Congress did not intend an exemption for states acting as competitors, the majority should have concentrated on the role the state hospitals were playing and not merely on their status as agencies of the state.

Generally, "the anti-trust laws, and Robinson-Patman in particular are to be construed liberally, and the exceptions are to be construed strictly."[7] Since "the Act is remedial, it is to be construed broadly to effectuate its purposes," therefore "implied anti-trust immunity is not favored."[8] Only "some overriding public policy," *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 397, 98 S.Ct. 1123, 1128 (1978) (plurality opinion), is sufficient to overrule the presumption *against* state immunity from the application of the antitrust laws,[9] and in the instant case the majority has

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[7] *Portland Retail Druggists*, 425 U.S. at 11, 96 S.Ct. at 1313.

[8] *Id.*, 425 U.S. at 12, 96 S.Ct. at 1313.

[9] The majority seeks to distinguish the language in *City of Lafayette*, on the ground that the case was decided on the basis of the Sherman Act and not upon the Robinson-Patman Act. The argument runs that Congress used its powers under the Commerce Clause to the constitutional maximum in enacting the Sherman Act, while it did not use its powers to the full extent in the Clayton/Robinson-Patman Act. This argument is spurious. A comparison of the language used in the two statutes demonstrates that the only significant difference between them is the extent to which the activities complained of must affect interstate commerce. *See generally Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 95 S.Ct. 392 (1974). There is no difference in terms of the scope of who or what activities are regulated. *Cf. City of Lafayette*, 435 U.S. at 396, 98 S.Ct. at 1127-8 (comparing the scope of § 8 of the Sherman Act and § 4 of the Clayton Act). Thus, there is no basis for regarding the holding of *City of Lafayette* as anything less than compelling here.

shown no such policy.[10] Therefore the majority, in its unconvincing reasoning, has ignored not only a clear legislative history but also the policy behind the Act and the basic principles of antitrust law interpretation.

A brief comment should be made regarding the federalism argument used by the majority partially to support its opinion. Any reliance on *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465 (1976), is completely misplaced. Whatever state operations may be implicated by this action, what is complained of can in no way be characterized as a traditional government function or as an incident of state sovereignty. The complaint alleges that these state hospitals have ventured beyond their institutional function (and whatever state operations that might be incident thereto), and have begun instead to compete in the retail sale of drugs. This effectively distinguishes the present case from *Usery*, which concerned federal regulation of essential attributes of state sovereignty.[11] Thus, there is no substance to the Tenth Amendment argument that has been advanced.

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[10]The only policy argument advanced in support of today's result is the state's paramount interest in procuring the things it needs in order to do what it wants at the lowest cost. That policy is undisturbed by § 13's focus on the relative advantages of competing retailers. If my reasoning had been adopted in this case, this interest would not be threatened.

[11]The Supreme Court has only recently reminded us of the limits of the *Usery* doctrine.

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." . . . Second, the federal regulations must address matters that are indisputably "attributes of state sovereignty." . . . And third, it must be

[footnote continued]

Therefore, I disagree with both the conclusion of the majority to affirm the district court and with the reasons used by the majority in reaching its conclusion. The majority takes the fact that governments as consumers are excluded by the Act, calls such an exclusion an exemption, and then concludes that the exemption permits a government to sell in competition at retail with established businesses. Instead, I would look to the unambiguous language of the Act and at the clear policies behind the antitrust laws. I would look at the role of the state when it makes a purchase: if it is that of a consumer, the Act does not apply; but if, as in the instant case, it is that of a competitor, the state should be subjected to the Robinson-Patman regime. One need only look at the result today to see how blatantly the policies behind the Act have been disregarded. Therefore, I dissent.

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apparent that the States' compliance with federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

Hodel v. Virginia Surface Mining and Regulation Assn., Inc., 49 U.S.L.W. 4654, 4660 (June 15, 1981) (sustaining constitutionality of Surface Mining Control and Reclamation Act of 1977).

Needless to say, these requirements can hardly be considered satisfied in the instant case.

Joint Appendix

No. 81-827

Supreme Court, U.S.
FILED
APR 22 1982
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.,

Petitioner,

v.

ABBOTT LABORATORIES, A CORPORATION; CIBA-GEIGY CORPORATION, A CORPORATION, D/B/A CIBA PHARMACEUTICAL COMPANY; AMERICAN CYANAMID CO., A CORPORATION, D/B/A LEDERLE & LABS. DIVISION; PARKE-DAVIS & CO., A CORPORATION; CHARLES PFIZER & CO., INC., A CORPORATION, D/B/A PFIZER LABORATORIES; OLIN CORPORATION, FORMERLY KNOWN AS E. R. SQUIBB & SONS, INC., D/B/A SQUIBB PHARMACEUTICAL COMPANY; THE UPJOHN CO., A CORPORATION; AMERICAN HOME PRODUCTS CORP., A CORPORATION, D/B/A WYETH LABORATORIES AND D/B/A AYERST LABORATORIES; BRISTOL-MYERS COMPANY, A CORPORATION, D/B/A BRISTOL LABORATORIES; MERCK SHARP & DOHME ORTHOPEDICS COMPANY, INC., A CORPORATION; HOFFMAN-LA ROCHE, INC., A CORPORATION; G. D. SEARLE & CO., A CORPORATION, D/B/A SEARLE LABORATORIES; TRAVENOL LABS, INC., A CORPORATION, D/B/A FLINT LABORATORIES; THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA HOSPITAL PHARMACY AND RUSSELL AMBULATORY CENTER PHARMACY; COOPER GREEN HOSPITAL, A NON-PROFIT CORPORATION, D/B/A COOPER GREEN HOSPITAL PHARMACY; ABC CORP. AND XYZ CORP., WHOSE IDENTITIES ARE UNKNOWN AT THIS TIME TO THE PLAINTIFFS, BUT WILL BE ADDED BY AMENDMENT WHEN ASCERTAINED,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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NOTE:

Petitioner will not reproduce the opinion of the United States District Court or the dissenting opinion of Honorable Thomas A. Clark, Circuit Judge, as these have been previously reproduced and appear as follows:

(a) The decision of the United States Court of Appeals for the Fifth Circuit as well as the Memorandum of Opinion written by the United States District Court for the Northern District of Alabama appear at page 1a as Appendix A of Petitioner's Petition for Writ of Certiorari filed on October 30, 1981.

(b) Dissenting opinion of Honorable Thomas A. Clark, Circuit Judge, at page 24a, as Appendix B of Petitioner's Petition for Writ of Certiorari which was filed on October 30, 1981.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

Civil Action No. 78-P-0870-S

[Filed: Aug. 7, 1978]

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., a non-profit corporation, an assignee of all of the anti-trust claims and choses of action of its members,

Plaintiff,

v.

ABBOTT LABORATORIES, a corporation; CIBA-GEIGY CORPORATION, a corporation, d/b/a CIBA Pharamaceutical Company; AMERICAN CYANAMID CO., a corporation, d/b/a Lederle & Labs. Division; PARKE-DAVIS & CO., a corporation; CHARLES PFIZER & CO., INC., a corporation, d/b/a Pfizer Laboratories; OLIN CORPORATION, formerly known as E. R. SQUIBB & SONS, INC., d/b/a/ Squibb Pharmaceutical Company; THE UPJOHN CO., a corporation; AMERICAN HOME PRODUCTS CORP., a corporation, d/b/a Wyeth Laboratories and d/b/a Ayerst Laboratories; BURROUGHS WELLCOME & CO. (U.S.A.), INC., a corporation; BRISTOL-MYERS COMPANY, a corporation, d/b/a Bristol Laboratories; MERCK SHARP & DOHME ORTHOPEDICS COMPANY, INC., a corporation; HOFFMAN-LA ROCHE, INC., a corporation; G. D. SEARLE

& CO., a corporation, d/b/a Searle Laboratories; TRAVENOL LABS, INC., a corporation, d/b/a Flint Laboratories; THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, d/b/a University of Alabama Hospital Pharmacy and Russell Ambulatory Center Pharmacy; COOPER GREEN HOSPITAL, a non-profit corporation, d/b/a Cooper Green Hospital Pharmacy; ABC Corp. and XYZ Corp., whose identities are unknown at this time to the Plaintiffs, but will be added by amendment when ascertained,

Defendants.

COMPLAINT

Parties

1. Plaintiff is a non-profit corporation organized and existing under the laws of the State of Alabama, whose members are retail pharmacies and pharmacists doing business in Jefferson County, Alabama. Plaintiff is the assignee of all claims and choses in action which arise under the anti-trust laws of the United States against the named Defendants.

2. Defendant Abbott Laboratories is a corporation organized and existing under the laws of the State of Illinois, and doing business in Alabama and elsewhere, as a manufacturer of pharmaceuticals. This Defendant will be hereinafter called "Abbott".

3. Defendant CIBA-GEIGY Corporation is a corporation organized and existing under the laws of the State of New York, and doing business as CIBA Pharmaceutical Company, in Alabama and elsewhere as a manufacturer of pharmaceuticals. This Defendant will be hereinafter called "CIBA".

4. Defendant American Cyanamid Co. is a corporation organized and existing under the laws of the State of Maine, and doing business as Lederle Labs. Division in Alabama and elsewhere as a manufacturer of pharmaceuticals. This Defendant will be hereinafter called "Lederle Labs".

5. Defendant Parke-Davis & Co. is a corporation organized and existing under the laws of the State of Michigan, and doing business in Alabama and elsewhere as a manufacturer of pharmaceuticals. This Defendant will be hereinafter called "Parke-Davis".

6. Defendant Charles Pfizer & Co., Inc. is a corporation organized and existing under the laws of the State of Delaware, and doing business as Pfizer Laboratories in Alabama and elsewhere as a manufacturer of pharmaceuticals. This Defendant will be hereinafter called "Pfizer".

7. Defendant Olin Corporation is a corporation organized and existing under the laws of the State of Delaware, formerly was called E. R. Squibb & Sons, Inc., and is doing business in Alabama and elsewhere as Squibb Pharmaceutical Co. as a manufacturer of pharmaceuticals. This Defendant will be hereinafter called "Squibb".

8. Defendant The Upjohn Co. is a corporation organized and existing under the laws of the State of Delaware, and doing business in Alabama and elsewhere as a manufacturer of pharmaceuticals. This Defendant will be hereinafter called "Upjohn".

9. Defendant American Home Products Corp. is a corporation organized and existing under the laws of the State of Alabama, and doing business Ayerst Laboratories and as Wyeth Laboratories in Alabama and elsewhere as a manufacturer of pharmaceuticals. This

Defendant will be hereinafter called "Ayerst" and "Wyeth" respectively.

10. Defendant Burroughs Wellcome & Co. (U.S.A.), Inc. is a corporation organized and existing under the laws of the State of New York, and doing business in Alabama and elsewhere as a manufacturer of pharmaceuticals. This Defendant will be hereinafter called "Burroughs".

11. Defendant Bristol-Myers Co. is a corporation organized and existing under the laws of the State of Delaware, and doing business in Alabama and elsewhere as Bristol Laboratories, as a manufacturer of pharmaceuticals. This Defendant will be hereinafter called "Bristol-Myers".

12. Defendant Merck Sharp & Dohme Orthopedics Company is a corporation organized and existing under the laws of the State of Delaware, and doing business in Alabama and elsewhere as a manufacturer of pharmaceuticals, orthopedic products and/or orthopedic supplies. This Defendant will be hereinafter called "Merck".

13. Defendant Hoffman-La Roche, Inc. is a corporation believed to be organized and existing under the laws of the State of New Jersey, and doing business as Roche Laboratories in Alabama and elsewhere as a manufacturer of pharmaceuticals. This Defendant will be hereinafter called "Roche".

14. Defendant Ortho Pharmaceutical Corp. is a corporation believed to be organized and existing under the laws of the State of New Jersey, and doing business in Alabama and elsewhere as a manufacturer of pharmaceuticals. This Defendant will hereinafter be called "Ortho".

15. Defendant G. D. Searle & Co. is a corporation organized and existing under the laws of the State of Illinois, doing business as Searle Laboratories in Alabama and elsewhere as a manufacturer of pharmaceuticals. This Defendant will be hereinafter called "Searle".

16. Defendant Travenol Labs, Inc. is a corporation believed to be organized and existing under the laws of the State of Michigan, and doing business as Flint Laboratories in Alabama and elsewhere as a manufacturer of pharmaceuticals. This Defendant will be hereinafter called "Flint".

17. Defendant The Board of Trustees of the University of Alabama is a body corporation organized and existing by virtue of Code of Alabama 1975, §§ 16-47-1, *et seq.*, and doing business in Birmingham, Alabama as the University of Alabama Hospital Pharmacy and the Russell Ambulatory Center Pharmacy. This Defendant will be hereinafter called "UA Pharmacy" and "Russell Pharmacy", respectively.

18. Defendant Cooper Green Hospital is a non-profit corporation organized and existing under the laws of the State of Alabama and doing business in Birmingham, Alabama as Cooper Green Hospital Pharmacy. This Defendant will be hereinafter called "Cooper Green Pharmacy".

Jurisdiction

1. This Complaint is filed and these proceedings are instituted under the provisions of 15 USC §§ 13(a), 13(f), 13c, and 15.

2. This Court has jurisdiction of this action under 28 USC § 1337.

3. All acts complained of herein were begun or were terminated in Jefferson County, Alabama within this judicial district, and were transactions in interstate commerce.

4. Defendant manufacturers Abbott, CIBA, Lederle Labs, Parke-Davis, Pfizer, Squibb, Upjohn, Ayerst, Wyeth, Burroughs, Bristol-Myers, Merck, Roche, Ortho, Searle, Flint, ABC Corp. and XYZ Corp., are all firms engaged in selling their manufactured goods in interstate commerce.

5. Defendants UA Pharmacy, Russell Pharmacy, and Cooper Green Pharmacy are organizations which purchase goods in interstate commerce from the other Defendants, and who resell such goods so purchased at the retail level in Jefferson County, Alabama.

Causes of Action

Count I.

1. During a period commencing four years next preceding the filing of this Complaint the Defendant manufacturers sold their goods to Plaintiff's assignors, and said goods moved in interstate commerce.

2. During a period commencing four years next preceding the filing of this Complaint the Defendant manufacturers sold their goods to Defendants UA Pharmacy, Russell Pharmacy, and Cooper Green Pharmacy, and said goods moved in interstate commerce.

3. In selling said goods to the UA Pharmacy, to the Russell Pharmacy, and to the Cooper Green Pharmacy, the Defendant manufacturers have sold said goods to UA Pharmacy, Russell Pharmacy and Cooper Green Pharmacy at prices which were substantially lower than

the prices at which goods of the same or a similar grade, quality and nature were sold to Plaintiff's assignors without good and legal reason.

4. The differences in the prices that the Defendant manufacturers sold their goods to UA Pharmacy, Russell Pharmacy, and Cooper Green Pharmacy, and to Plaintiff's assignors constitute unlawful price discrimination.

5. As a direct and proximate result of the Defendant manufacturers' price discrimination in selling their goods to Plaintiff's assignors, and UA Pharmacy, Russell Pharmacy and Cooper Green Pharmacy, the Plaintiff's assignors were injured in their business and property in diverse ways, including, but not limited to the following:

(a) Plaintiff's assignors' costs for said goods were greatly increased, and their profits on their retail sales of same were thereby reduced.

(b) Plaintiff's assignors have lost retail sales and the profits therefrom, as a result of UA Pharmacy, Russell Pharmacy, and Cooper Green Pharmacy's paying substantially less for said goods, and being able to undersell Plaintiff's assignors on retail sales of said goods.

(c) Due to the Defendant manufacturers discriminatory conduct, Plaintiff's assignors' competitive positions in the retail prescription drug market in Jefferson County, Alabama were injured by Plaintiff's assignors' inability to maintain prices competitive with those of UA Pharmacy, Russell Pharmacy and Cooper Green Pharmacy.

6. At this time the Plaintiff cannot accurately estimate its damages, but believes that its damages will approach or exceed $500,000.00. After appropriate discovery, Plaintiff will seek to amend its Complaint to reflect a more accurate approximation of its damages.

7. As a direct and proximate result of the Defendant manufacturers' said discriminatory conduct against Plaintiff's assignors, Plaintiff has been damaged in the total estimated sum of $500,000.00. Under 15 USC § 15 Plaintiff is entitled to recover from the Defendant manufacturers treble damages and costs of suit, including a reasonable attorney's fee.

WHEREFORE, Plaintiff prays the Court for the following relief:

(1) For leave to amend its Complaint to reflect a better and more accurate estimation of its damages, at such time as it can complete sufficient discovery to allow it to make such an estimation.

(2) For a judgment against the Defendant manufacturers in the amount of $500,000.00 or such other amount as may be later added by amendment, and that such amount be trebled in accordance with the provisions of 15 USC § 15.

(3) For Plaintiff's costs of suit, including reasonable attorney's fees pursuant to 15 USC § 15.

(4) For a permanent injunction forever barring the Defendant manufacturers from again engaging in the discriminatory conduct complained of above.

(5) And for such other, further or different relief as the Court may deem just and proper under the evidence of this case.

Count II.

1. Defendants UA Pharmacy, Russell Pharmacy, and Cooper Green Pharmacy are organizations engaged in commerce in that they frequently order and receive large quantities of goods from the Defendant manufacturers and others, and said goods travel in interstate commerce.

2. During a period commencing four years next preceding the filing of this Complaint, in the course of interstate commerce with the Defendant manufacturers, UA Pharmacy, Russell Pharmacy and Cooper Green Pharmacy have knowingly induced the Defendant manufacturers to grant unto them prices for said goods, which prices discriminate against Plaintiff's assignors, and they have received discriminatorily lower prices than the prices paid for goods of a similar grade, quality and nature by Plaintiff's assignors.

3. As a direct and proximate result of UA Pharmacy, Russell Pharmacy and Cooper Green Pharmacy having received said discriminatorily lower prices, the Plaintiff's assignors were injured in their business and property in diverse ways, including, but not limited to the following:

(a), (b), and (c) Plaintiff here re-alleges and adopts by reference the allegations of paragraphs 5.(a), 5.(b) and 5.(c) of Count I. above.

4. Plaintiff here re-alleges by reference the allegations of paragraph 6. of Count I. above.

5. Plaintiff here re-alleges by reference the allegations of paragraph 7. of Count I. above.

WHEREFORE, Plaintiff prays the Court for the following relief:

(1) For leave to amend its Complaint to reflect a better and more accurate estimation of its damages, at such time as it can complete sufficient discovery to allow it to make such an estimation.

(2) For a judgment against the Defendant manufacturers in the amount of $500,000.00, or such other amount as may be later added by amendment, and that such amount be trebled in accordance with the provisions of 15 USC § 15.

(3) For Plaintiff's costs of suit, including reasonable attorney's fees pursuant to 15 USC § 15.

(4) For a permanent injunction forever barring Defendants UA Pharmacy, Russell Pharmacy and Cooper Green Pharmacy from again engaging in the discriminatory conduct complained of above.

(5) And for such other, further or different relief as the Court may deem just and proper under the evidence of this case.

/s/ Joe L. Tucker, Jr.
Attorney for Plaintiff

Of Counsel:

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(205) 424-1185

/s/ Allen W. Howell
Attorney for Plaintiff

Of Counsel:

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Montgomery, Ala. 36104
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IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

Civil Action No. 78-P-0870-S

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., *ETC.*,
Plaintiff,

v.

ABBOTT LABORATORIES, a corporation, et al.; E. R. SQUIBB & SONS, INC., d/b/a Squibb Pharmaceutical Company, et al.,
Defendants,

FIRST AMENDMENT TO COMPLAINT

Comes now your Plaintiff by and with the knowledge, consent and agreement of the Defendant Olin Corporation, formerly known as E. R. Squibb & Sons, Inc., d/b/a Squibb Pharmaceutical Company, and amends its Complaint as follows:

1. Paragraph 7. under the heading Parties in the original Complaint is stricken, and the following is substituted therefor:

7. Defendant E. R. Squibb & Sons, Inc., d/b/a Squibb Pharmaceutical, is a corporation believed to have been organized and existing under the laws of the State of Delaware, and is doing business in Alabama and elsewhere as Squibb Pharmaceutical Co. as a

manufacturer of pharmaceuticals. This Defendant will be hereinafter called "Squibb".

2. Defendant Olin Corporation is stricken from the Complaint, and in its place, is added Defendant E. R. Squibb & Sons, Inc.

3. This substitution of Defendants is made with the knowledge, consent, and by the agreement of the Hon. Jack Noble, of the law firm of Thomas, Taliaferro, Forman, Burr, and Murray, Attorney for Olin Corporation and for E. R. Squibb & Sons, Inc. The Hon. Jack Noble has agreed to accept service of this Amended Complaint by regular United States Mail from Plaintiff's attorney, and has agreed to respond to same. The Hon. Jack Noble has agreed with Plaintiff's attorney to waive any defects in the service of the original complaint upon Olin Corporation instead of E. R. Squibb & Sons, Inc.

4. Except as otherwise noted above, the original complaint remains unchanged.

Respectfully submitted,

/s/ Allen W. Howell
Attorney for Plaintiff

Of Counsel:

Allen W. Howell
Attorney at Law
The Jordan Bldg.
Suite # 1
322 Alabama Street
Montgomery, Ala. 36104
(205) 264-2216

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon the Honorable Jack Noble, attorney for Olin Corporation and for E. R. Squibb & Sons, Inc. and upon Plaintiff's co-counsel, by sending each of them a copy of same by first class U.S. Mail, postage prepaid and properly addressed to their respective offices.

Done this the 30th day of August, 1978.

/s/ Allen W. Howell

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. 78-P-0870-S

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, *ETC.*,
Plaintiff,

v.

ABBOTT LABORATORIES, *ET AL.*,
Defendant.

SECOND AMENDMENT TO COMPLAINT

Comes now the Plaintiff pursuant to Rule 15 F.R.C.P. and amends its Complaint heretofore filed and served in this cause as follows:

Both Count I. of said Complaint is amended by adding the following as paragraph 8. thereto, and Count II. of said Complaint is amended by adding the following as paragraph 6. thereto:

> The price discrimination complained of herein was illegal under 15 USC 13 and 113c because the goods purchased at discriminatorily lower prices by UA Pharmacy, Russell Pharmacy and Cooper Green Pharmacy were not exempt "purchases" "for their own use" under 15 USC 13c, as said 13c has been defined by the United States Supreme Court in *Abbott*

Laboratories v. Portland Retail Druggists Association, Inc., 425 U.S. 1, 47 L. Ed. 2d 537, 96 S. Ct. 1305 (1976).

Except as hereinabove amended, said Complaint, as first amended, shall remain unchanged.

Respectfully submitted,

/s/ Allen W. Howell
Attorney for Plaintiff

Of Counsel:

Allen W. Howell
Attorney at Law
Jordan Bldg., Suite # 1
322 Alabama Street
Montgomery, AL 36104
264-2216

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on all counsel of record by sending them a copy of same by first class U.S. Mail postage prepaid.

Done this the 25th day of September, 1978.

/s/ Allen W. Howell

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. CA-78-P-0870-S

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., *ETC.*,
Plaintiff,

v.

ABBOTT LABORATORIES, a corporation,
ET AL.,
Defendants.

MOTION TO DISMISS

Comes now G. D. SEARLE & CO., one of the defendants in the above-styled action, and moves the Court to dismiss the complaint and action on the ground that the complaint fails to state a claim upon which relief can be granted.

/s/ William G. Somerville, Jr.

/s/ Lawrence B. Clark
Attorneys for G. D. Searle & Co.

Of Counsel:
LANGE, SIMPSON,
ROBINSON & SOMERVILLE

1700 First Alabama Bank Building
Birmingham, Alabama 35203
Telephone: (205) 252-7000

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss has been served upon counsel for plaintiffs, Joe L. Tucker, Jr., at 1413 Fourth Avenue, North, Bessemer, Alabama 35020 and Allen W. Howell, Jordan Building, Suite #1, 322 Alabama Street, Montgomery, Alabama 36104, by mailing a copy, postage prepaid, this the 1st day of September, 1978.

/s/ Lawrence G. Somerville, Jr.
Of Counsel

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. CA-78-P-0870-S

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., *ETC.*,
Plaintiff,

v.

ABBOTT LABORATORIES, a corporation,
ET AL.,
Defendants.

AMENDED MOTION TO DISMISS

Comes now G. D. SEARLE & CO., one of the defendants in the above-styled action, and amends its Motion to Dismiss previously filed in the action by adding the following and separate grounds:

2. To dismiss the action because the plaintiff lacks standing to maintain the action.

3. To dismiss the action because the plaintiff is not the real party in interest.

4. To dismiss the action because the complaint fails to state a claim against this defendant upon which relief can be granted.

5. To dismiss the action because the sales of goods alleged to have been made at unlawfully discriminatory

prices were made to governmental instrumentalities and therefore are not proscribed by the Robinson-Patman Act (13 U.S.C. § 13 et seq.).

6. To dismiss this action because the sales of goods alleged to have been made at unlawfully discriminatory prices were exempt from the proscription of the Robinson-Patman Act by 13 U.S.C. § 13c.

/s/ William G. Somerville, Jr.

/s/ Lawrence B. Clark

Attorneys for G. D. Searle & Co.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. 78-P-0870-S

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., a non-profit corporation, *ETC.*,
Plaintiff,

v.

ABBOTT LABORATORIES, *ET AL.*,
Defendants.

MOTION TO DISMISS

Defendant, Bristol Laboratories, a division of Bristol-Myers Company, a corporation, moves this Court to dismiss this action in that plaintiff's complaint fails to state a claim against defendant upon which relief may be granted.

/s/ Robert M. Collins

/s/ E. Alston Ray

BALCH, BINGHAM, BAKER,
HAWTHORNE, WILLIAMS & WARD
600 North 18th Street
P. O. Box 306

Birmingham, Alabama 35201
(205) 251-8100
Attorneys for Defendant,
Bristol Laboratories

CERTIFICATE OF SERVICE

I certify I have served a copy of the foregoing Motion to Dismiss upon Joe L. Tucker, Jr. and Allen W. Howell, Attorneys for Plaintiff and upon M. R. Nachman, Jr., Steiner, Crum & Baker, Attorneys for defendant Hoffman-La Roche, Inc., by mailing a copy of same to their respective office addresses, U.S. Mail, postage prepaid and properly addressed, this 1st day of September, 1978.

/s/ Robert M. Collins
Of Counsel

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. 78-P-0870-S

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.,
Plaintiff,

v.

ABBOTT LABORATORIES, a corporation,
ET AL.,
Defendants,

MOTION TO DISMISS

Comes now Merck Sharp & Dohme Orthopedics Company, Inc., a corporation, one of the defendants in the above-styled cause, and moves the Court to dismiss plaintiff's complaint on the ground that it fails to state a claim upon which relief can be granted.

/s/ L. Murray Alley
Attorney for Defendant
Merck Sharp & Dohme Orthopedics Company, Inc., a corporation

Of Counsel:

CABANISS, JOHNSTON,
GARDNER, DUMAS & O'NEAL

1900 First National-Southern
Natural Building
Birmingham, Alabama 35203
(205) 252-8800

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion to Dismiss has been served upon counsel of record for plaintiff by depositing the same in the United States Mail, properly addressed and postage prepaid, as follows:

Mr. Allen W. Howell
Jordan Building, Suite # 1
322 Alabama Street
Montgomery, Alabama 36104

Mr. Joe L. Tucker, Jr.
1413 4th Avenue, North
Bessemer, Alabama 35020

this 6th day of September, 1978.

/s/ L. Murray Alley
Of Counsel

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. P-0870-S

[Filed: September 6, 1978]

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., a non-profit corporation,
Plaintiff,

v.

ABBOTT LABORATORIES,
a corporation, *ET AL.*,
Defendants.

MOTION TO DISMISS

Defendant, The Upjohn Company, moves the Court as follows:

1. To dismiss the action because the plaintiff lacks standing to maintain the action.

2. To dismiss the action because the plaintiff is not the real party in interest.

3. To dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

4. To dismiss the action because the sales of goods alleged to have been made at unlawfully discriminatory prices were made to governmental instrumentalities and therefore are not proscribed by the Robinson-Patman Act (13 U.S.C. § 13 et seq.).

5. To dismiss this action because the sales of goods alleged to have been made at unlawfully discriminatory prices were exempt from the proscription of the Robinson-Patman Act by 13 U.S.C. § 13c.

/s/ A. Jack Noble, Jr.

/s/ J. Ross Forman, III

Attorneys for Defendant
The Upjohn Company

Of Counsel:

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(205) 251-3000

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. P-0870-S

[Filed: September 6, 1978]

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., a non-profit corporation,
Plaintiff,

v.

ABBOTT LABORATORIES,
a corporation, *ET AL.*,
Defendants.

MOTION TO DISMISS

Defendant, Ciba-Geigy Corporation, moves the Court as follows:

1. To dismiss the action because the plaintiff lacks standing to maintain the action.

2. To dismiss the action because the plaintiff is not the real party in interest.

3. To dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

4. To dismiss the action because the sales of goods alleged to have been made at unlawfully discriminatory

prices were made to governmental instrumentalities and therefore are not proscribed by the Robinson-Patman Act (13 U.S.C. § 13 et seq.).

5. To dismiss this action because the sales of goods alleged to have been made at unlawfully discriminatory prices were exempt from the proscription of the Robinson-Patman Act by 13 U.S.C. § 13c.

/s/ A. Jack Noble, Jr.

/s/ J. Ross Forman, III

Attorneys for Defendant
Ciba-Geigy Corporation

Of Counsel:

THOMAS, TALIAFERRO,
FORMAN, BURR AND MURRAY
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Birmingham, Alabama 35203
(205) 251-3000

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
Southern Division

Civil Action No. 78-P-0870-S

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.,
Plaintiff,

v.

HOFFMANN-La ROCHE, INC., *ET AL.*,
Defendants.

MOTION TO DISMISS
OF DEFENDANT HOFFMANN-La ROCHE, INC.

Hoffmann-La Roche, Inc. moves this Court to dismiss this action on the following grounds:

1. There is no jurisdiction of the subject matter.

2. There is no jurisdiction of the subject matter in that it affirmatively appears that plaintiff has no standing to sue.

3. There is no jurisdiction of the subject matter in that the asserted cause of action is based on alleged discrimination in sales to city, county and state governments.

4. There is no jurisdiction of the subject matter in that it affirmatively appears that there has been no injury to plaintiff in its business or property.

5. There is no jurisdiction of the subject matter in that it affirmatively appears that the alleged discrimination does not substantially lessen or tend to create a monopoly in any line of commerce, nor does it injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of the alleged discrimination, or with the customers of either of them.

6. The complaint fails to state a claim upon which relief can be granted.

7. The complaint fails to state a claim upon which relief can be granted in that it affirmatively appears that plaintiff has no standing to sue.

8. The complaint fails to state a claim upon which relief can be granted in that the asserted cause of action is based on alleged discrimination in sales to city, county and state governments.

9. The complaint fails to state a claim upon which relief can be granted in that it affirmatively appears that there has been no injury to plaintiff in its business or property.

10. The complaint fails to state a claim upon which relief can be granted in that it affirmatively appears that the alleged discrimination does not substantially lessen or tend to create a monopoly in any line of commerce, nor does it injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of the alleged discrimination, or with the customers of either of them.

STEINER, CRUM & BAKER

By /s/ M. R. Nachman, Jr.

Attorneys for Hoffmann-La Roche, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the above and foregoing Motion to Dismiss upon Mr. Joe L. Tucker, Jr., Mr. Allen W. Howell, Mr. Robert M. Collins, Mr. Murray Alley, Mr. Jack Noble and Mr. James Barton, by mailing a copy of same to them, properly addressed, postage prepaid, by United States Mail, on this the 15th day of September, 1978.

/s/ M. R. Nachman, Jr.
Of Counsel

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. P-0870-S

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., a non-profit corporation,
Plaintiff,

v.

ABBOTT LABORATORIES,
a corporation, *ET AL.*,
Defendants.

MOTION TO DISMISS

Defendant, E. R. Squibb & Sons, Inc., moves the Court as follows:

1. To dismiss the action because the plaintiff lacks standing to maintain the action.

2. To dismiss the action because the plaintiff is not the real party in interest.

3. To dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

4. To dismiss the action because the sales of goods alleged to have been made at unlawfully discriminatory

prices were made to governmental instrumentalities and therefore are not proscribed by the Robinson-Patman Act (13 U.S.C. § 13 et seq.).

5. To dismiss this action because the sales of goods alleged to have been made at unlawfully discriminatory prices were exempt from the proscription of the Robinson-Patman Act by 13 U.S.C. § 13c.

/s/ A. Jack Noble, Jr.

/s/ J. Ross Forman, III

Attorneys for Defendant
E. R. Squibb & Sons, Inc.

Of Counsel:

THOMAS, TALIAFERRO, FORMAN
BURR AND MURRAY
1600 Bank for Savings Bldg.
Birmingham, Alabama 35203
(205) 251-3000

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. P-0870-S

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., a non-profit corporation,
Plaintiff,

v.

ABBOTT LABORATORIES, a corporation, *ET AL.*,
Defendants.

MOTION TO DISMISS

Defendant Pfizer Inc., named in the Complaint as Charles Pfizer & Co., Inc., hereby moves, pursuant to Rules 12(b)(6) and 17(a) of the Federal Rules of Civil Procedure, for an order dismissing this action on the grounds that:

1. The plaintiff lacks standing to maintain the action;

2. The plaintiff is not the real party in interest;

3. The complaint fails to state a claim against defendant Pfizer Inc. upon which relief can be granted;

4. Sales of goods alleged to have been made at discriminatory prices were made to governmental instrumentalities and therefore were lawful; and

5. Sales of goods alleged to have been made at discriminatory prices were lawful under 15 U.S.C. § 13c.

/s/ A. Jack Noble, Jr.
Attorney for Defendant
Pfizer Inc.

Of Counsel:

THOMAS, TALIAFERRO, FORMAN
BURR AND MURRAY
1600 Bank for Savings Bldg.
Birmingham, Alabama 35203
(205) 251-3000

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 759-8400

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. 78-P-0870-S

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.,
Plaintiff,

v.

ABBOTT LABORATORIES, *ET AL.*,
Defendants.

MOTION OF DEFENDANT AMERICAN CYANAMID COMPANY TO DISMISS AND FOR SUMMARY JUDGMENT

COMES the defendant American Cyanamid Company and moves to dismiss the complaint and each claim therein under Rule 12(b)(6) F.R.C.P. and in the alternative for summary judgment as to the complaint and to each claim therein under Rule 56(b) F.R.C.P. upon the following separate grounds:

1. Complaint fails to state a claim upon which relief can be granted in that, as this Court judicially knows, the defendant University of Alabama and the defendant Cooper Green Hospital are each an agency or instrumentality of the State of Alabama, sales to which are exempt as a matter of law from the sanctions of Section 2(a)

of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a).

2. Complaint fails to state a claim upon which relief can be granted in that, as this Court judicially knows, the defendant University of Alabama and the defendant Cooper Green Hospital are each an agency or instrumentality of the State of Alabama and each is a nonprofit public corporation, sales to which are exempt as a matter of law from the sanctions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a); by virtue of the Nonprofit Institutions Act, 15 U.S.C. § 13c insofar as the sales made the subject of the complaint are for said hospitals' "own use" as defined by the Supreme Court of the United States in *Abbott Laboratories v. Portland Retail Druggist Ass'n.*, 425 U.S. 1 (1976).

Respectfully submitted,

/s/ James C. Barton

Attorney for
American Cyanamid Company

JOHNSTON, BARTON,
PROCTOR, SWEDLAW & NAFF
1212 Bank for Savings Building
Birmingham, Alabama 35203
Phone: (205) 322-0616

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the above and foregoing Motion of Defendant American Cyanamid Company to Dismiss and for Summary Judg-

ment on Joseph Tucker, attorney for the plaintiff, by placing a copy of same in the United States Mail, postage prepaid and addressed to his regular mailing address.

This the 27th day of September, 1978.

/s/ James C. Barton

Attorney for Defendant
American Cyanamid Company

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. 78-P-0870-S

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., a non-profit corporation, as assignee of all of the anti-trust claims and choses of action of its members,

Plaintiff,

v.

ABBOTT LABORATORIES, a corporation, *ET AL.*,

Defendants.

MOTION ON BEHALF OF THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA TO DISMISS THE COMPLAINT

Comes now The Board of Trustees of the University of Alabama ("the Board"), by and through its undersigned counsel, and moves this Court to dismiss the Complaint herein. As grounds therefor, the Board states as follows:

1. The Complaint fails to state a cause of action upon which relief may be granted.

2. The Complaint fails to state a cause of action upon which relief against the Board may be granted.

3. This suit is prohibited by the Eleventh Amendment to the Constitution of the United States, insofar as it seeks a remedy against the Board.

4. The Complaint on its face shows that the Board is immune from this suit, because the Board "exists by virtue of the Code of Alabama 1975, §§ 16-47-1, *et seq.*," derived from the authority of Art. XIV, § 264, Constitution of Alabama, and as such the Board is a state agency to which Congress did not intend to apply the prohibitions imposed by the Robinson-Patman Act.

5. The Board is exempt from this suit by reason that the acts complained of are the acts of the State of Alabama.

6. This court lacks jurisdiction of the subject matter of this suit because Congress did not intend that the Robinson-Patman Act apply to the states.

7. This suit is prohibited by the Tenth Amendment to the Constitution of the United States, insofar as it seeks a remedy against the Board.

8. The plaintiff lacks standing to bring this lawsuit.

Respectfully submitted,

/s/ John J. Coleman, Jr.

/s/ James P. Alexander

/s/ E. Mabry Rogers

/s/ Linda A. Friedman

Of Counsel:

BRADLEY, ARANT, ROSE & WHITE
1500 Brown-Marx Building

Birmingham, Alabama 35203
(205) 252-4500

R. Lee Walthall, University Counsel
Betsy S. Kimball, Associate Counsel
UNIVERSITY OF ALABAMA
IN BIRMINGHAM
University Station
Birmingham, Alabama 35294

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. 78-P-0870-S

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., a non-profit corporation,
Plaintiff,

v.

ABBOTT LABORATORIES, a corporation, *ET AL.*,
Defendants.

MOTION TO DISMISS

Defendant TRAVENOL LABORORATORIES, INC., a Delaware corporation, named in the complaint as Travenol Labs, Inc., hereby moves this Honorable Court, pursuant to Rules 12(b)(6) and 17(a) of the Federal Rules of Civil Procedure, for an order dismissing this action on the grounds that:

1. This Court lacks jurisdiction over the subject matter of this action;

2. The plaintiff lacks standing to maintain this action;

3. The plaintiff is not the real party in interest;

4. The complaint fails to state a claim against this defendant upon which relief can be granted;

5. Sales of goods alleged to have been made at discriminatory prices were made to governmental instrumentalities and therefore were lawful; and

6. Sales of goods alleged to have been made at discriminatory prices were lawfully made under 15 U.S.C. § 13(c).

/s/ James L. North

Attorney for Defendant
Travenol Laboratories, Inc.

Of Counsel:

NORTH, HASKELL, SLAUGHTER,
YOUNG & LEWIS
1710 First National-Southern
Natural Building
Birmingham, Alabama 35203
(205) 252-8847

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion to dismiss has been served upon counsel for the plaintiff, Joe L. Tucker, Esq., 1413 4th Avenue North, Bessemer, Alabama 35020 and Allen W. Howell, Esq., Suite # 1, Jordan Building, 322 Alabama Street, Montgomery, Alabama 36104, and upon counsel for all other defendants who have appeared in the action, by placing copies in the United States Mail, postage prepaid, and addressed to their regular mailing addresses.

This the 28th day of September, 1978.

/s/ James L. North

Counsel for Defendant
Travenol Laboratories, Inc.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. P-0870-S

[Filed: September 29, 1978]

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., a non-profit corporation,
Plaintiff,

v.

ABBOTT LABORATORIES, a corporation, *ET AL.*,
Defendants.

MOTION TO DISMISS

COMES NOW the Defendant, The Cooper Green Hospital, and moves the court to dismiss this action on the following grounds:

1. The Plaintiff lacks standing to maintain the action.

2. The Plaintiff is not the real party in interest.

3. The complaint fails to state a claim against this Defendant upon which relief can be granted.

4. The sales of goods referred to in the complaint as being made to this Defendant, The Cooper Green Hospital, are made to a governmental agency or instrumentality and are thereby exempt as a matter of law

from the sanctions of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. §§ 13(a) & 13(c).

5. The sales of goods referred to in the complaint as being made to this Defendant, The Cooper Green Hospital, are made to a non-profit public charitable corporation and, as such, are exempt as a matter of law. 15 U.S.C. § 13(c).

In support of grounds 4 and 5 above, attached hereto and made a part hereof as Exhibit "A" is affidavit of Jon H. Vance, Executive Director of The Cooper Green Hospital of Jefferson County, Alabama.

/s/ Edwin A. Strickland

Jefferson County Attorney
Attorney for Defendant
The Cooper Green Hospital
213 Courthouse
Birmingham, Alabama 35203

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all attorneys of record for all parties in this case, by mailing a copy of the same to them, United States mail, properly addressed and postage prepaid.

This the 29th day of September, 1978.

/s/ Edwin A. Strickland

Jefferson County Attorney

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. 78-P-0870-S

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., a non-profit corporation,
Plaintiff,

v.

ABBOTT LABORATORIES, a corporation, *ET AL.*,
Defendants.

MOTION OF DEFENDANT, AMERICAN HOME PRODUCTS CORP., TO DISMISS COMPLAINT

Now comes defendant, American Home Products Corp., a corporation, and moves the court to dismiss the complaint in this cause as to this defendant, and as grounds for said motion, says as follows:

1. The complaint wholly fails to state a cause of action against this defendant upon which relief can be granted.

2. The complaint wholly fails to state a cause of action in favor of the named plaintiff.

3. It affirmatively appears from the complaint that this plaintiff lacks standing to maintain this action against this defendant.

4. Plaintiff seeks to maintain this action as the assignee of various persons, firms and corporations who are not parties to the action, and it affirmatively appears from the complaint that the cause of action sought to be asserted is non-assignable.

5. It is affirmatively appears from the complaint that the plaintiff is not the real party in interest.

6. The goods alleged to have been sold at unlawfully discriminatory prices are alleged to have been sold to governmental, non-profit institutions, and are not within the prohibition of the Robinson-Patman Act (15 USC § 13 et seq.).

7. It affirmatively appears that the sales of goods alleged to have been made at unlawfully discriminatory prices were sales that are exempt from the prohibition of the Robinson-Patman Act (15 USC § 13c).

8. The sales alleged in the complaint to have been made are alleged to have been made to institutions which are governmental institutions, and said sales are thereby exempted from the prohibition of the Robinson-Patman Act (15 USC § 13c).

9. The complaint wholly fails to identify the persons, firms or corporations who are alleged to have made an assignment to the plaintiff.

10. It is not alleged in the complaint from whom the plaintiff is supposed to have received an assignment.

11. It is not alleged whether the assignment on which plaintiff purports to rely is in writing.

12. The form and nature of the assignments upon which plaintiff purports to rely are not sufficiently described to allow the court to determine whether said assignments entitled the plaintiff to maintain this action against this defendant.

ROGERS, HOWARD, REDDEN & MILLS

By /s/ L. Drew Redden

Attorneys for Defendant,
American Home Products Corp.
1033 Frank Nelson Bldg.
Birmingham, AL 35203

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion of Defendant, American Home Products Corp., to Dismiss Complaint, on Counsel of Record for Plaintiff and Defendants, by mailing the same by United States mail, properly addressed and first class postage prepaid, on this the 24th day of September, 1978.

/s/ L. Drew Redden
Of Counsel

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. 78-P-0870-S

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.,
Plaintiff,

v.

ABBOTT LABORATORIES, *ET AL.*,
Defendants.

MOTION TO DISMISS OF DEFENDANT ABBOTT LABORATORIES

Defendant Abbott Laboratories, by its attorneys, moves for an order under Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing the complaint and this action as to it for failure to state a claim or claims against Abbott Laboratories on which relief can be granted, on the ground that as a matter of law, the Robinson-Patman Act is not applicable to sales to state or local governments or their agencies or instrumentalities.

RIVES, PETERSON, PETTUS,
CONWAY, ELLIOTT & SMALL

By /s/ Duncan Y. Manley

Attorneys for Defendant
Abbott Laboratories
800 First National-Southern
Natural Building
Birmingham, Alabama 35203
Tel: (205) 328-8141

Of Counsel:

Robert F. Ward
CHADWELL, KAYSER, RUGGLES,
McGEE & HASTINGS, LTD.
8500 Sears Tower
Chicago, Illinois 60606
Tel: (312) 876-2100

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

Civil Action No. 78-P-0870-S

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.,
Plaintiff,

v.

ABBOTT LABORATORIES, *ET AL.*,
Defendants.

MOTION TO DISMISS

Comes now one of the defendants in the above styled case, Parke-Davis and Company, a corporation, and moves the court to dismiss the complaint and each count and paragraph thereof, separately and severally, sets down and says the following:

1. That the complaint fails to state a cause of action against this defendant upon which relief may be granted.

McDANIEL, HALL, PARSONS & CONERLY

/s/ Jasper P. Juliano

725 1st Ala. Bank Bldg.
Birmingham, AL 35203
251-8143

CERTIFICATE OF SERVICE

I hereby certify that I have on this 2nd day of October, 1978, served a copy of the foregoing Motion on counsel for all parties concerned by sending same by U.S. Mail, postage prepaid and properly addressed to:

Joe L. Tucker, Esquire, 1413 4th Ave., N., Bessemer, AL 35020.

/s/ Jasper P. Juliano

Opposition

1

NO. 81-827

Office
FILED
DEC 1981
ALEXANDER L. STEVAS,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.
Petitioner,

v.

ABBOTT LABORATORIES, a corporation, et al.
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS

ABBOTT LABORATORIES; CIBA-GEIGY CORPORATION; AMERICAN CYANAMID CO.; PARKE-DAVIS & CO.; CHARLES PFIZER & CO., INC.; E. R. SQUIBB & SONS, INC.; THE UPJOHN CO.; AMERICAN HOME PRODUCTS CORP.; BRISTOL-MYERS COMPANY; MERCK SHARP & DOHME ORTHOPEDICS COMPANY, INC.; HOFFMAN-LA ROCHE, INC.; G. D. SEARLE & CO.; AND TRAVENOL LABS, INC.

DAVID KLINGSBERG
Kaye, Scholer, Fierman,
Hays & Handler
425 Park Avenue
New York, New York 10022
(212) 407-8000
Counsel for Respondent
Charles Pfizer & Co., Inc.
And On Behalf of Respondents
On Brief. See Signature Page
for Attorneys and Firms
Of Counsel.

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NO. 81-827

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.

Petitioner,

v.

ABBOTT LABORATORIES, a corporation, et al.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION*

COUNTERSTATEMENT OF QUESTION PRESENTED

Was the Court of Appeals correct in affirming, *per curiam*, on the District Court's opinion, the dismissal of a complaint by a retail pharmacists' association on the ground that the Robinson-Patman Act was not intended to apply to government purchases?

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*A disclosure statement similar to that required by Rule 28.1 of the Supreme Court Rules, as amended, was supplied to the Fifth Circuit in the Brief of Appellees pursuant to Local Rule 13(a). The Respondents joining in this Brief in Opposition will supply the Clerk with a current listing of the information required by Rule 28.1, as amended, by letter not later than December 9, 1981.

Statement of the Case

We refer to the opinion of the Court of Appeals below, reported at 656 F.2d 92 (5th Cir. 1981), adopting the opinion of the District Court, for a statement of the relevant facts. (Petitioner's Appendix A).

REASONS FOR DENYING THE WRIT

Petitioner fails to present any "special and important reason" for issuance of a writ of certiorari. Sup. Ct. Rule 17.

I. The Decisions Below Are Consistent with Supreme Court Authority

The first reason advanced by petitioner — an alleged inconsistency with *Abbott Laboratories v. Portland Retail Druggists Association, Inc.*, 425 U.S. 1 (1976) — is blatantly incorrect. There, petitioner did not even appeal from the dismissal of Robinson-Patman counts based on sales to government hospitals for failure to state a claim. This Court's opinion, which dealt solely with sales to non-governmental institutions, noted the district court's dismissal without criticism.[1]

II. The Decisions Below Are Supported by a Consistent Line of Authority by the Courts, Enforcement Agencies and Commentators

Petitioner's second reason for granting the writ incorrectly asserts that the issue is one of first impression. But petitioner ignores and fails even to cite the unbroken and

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[1]The Court noted:

> "Causes of action based on discrimination in sales to city, county, and state governments, and to the Federal Government (the third and fourth causes of action asserted in the amended complaint, Record 61-62) were dismissed for failure to state a claim." *Id.* at 4, n.2.

impressive authorities supporting the Fifth Circuit's decision that the Robinson-Patman Act was not intended to cover government purchases. In *Champaign-Urbana News Agency, Inc. v. J. L. Cummins News Co.*, 632 F.2d 680, 687-92 (7th Cir. 1980), the Seventh Circuit recently affirmed dismissal of a Robinson-Patman complaint based on government purchases, in that case by the Army Air Force Exchange Service. A long line of other case authorities consistently denying coverage for government purchases was relied on in the opinion below (16a),[2] and no contrary decision is cited by petitioner.

The Attorney General of the United States, who has statutory authority to enforce the Act, has also expressed the opinion on two separate occasions that it does not cover government purchases. 38 Op. Att'y. Gen. 539 (1936), 1932-39 Trade Cases ¶ 55,145 (December 28, 1936); *Report Under Executive Order 10936 on Identical Bidding in Public Procurement* (1962). Moreover, commentators have uniformly recognized that government purchases are not covered by the Act. *See* Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962), pp. 83-84; Von Kalinowski, 3 *Antitrust Laws and Trade Regulation* (1978), § 24.-06[2]; Cavitch, 5A *Business Organizations*, § 1050.01 [8][b, c].

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[2] *General Shale Products Corp. v. Struck Construction Co.*, 37 F. Supp. 598 (W.D. Ky. 1941), *aff'd on other grounds*, 132 F.2d 425 (6th Cir. 1942), *cert. denied*, 318 U.S. 780, 63 S.Ct. 857, 87 L.Ed. 1148 (1943); *Sachs v. Brown-Forman Distillers Corp.*, 134 F. Supp. 9 (S.D.N.Y. 1955), *aff'd per curiam on basis of district court opinion*, 234 F.2d 959 (2nd Cir.), *cert. denied*, 352 U.S. 925, 77 S.Ct. 221, 1 L.E.2d 160 (1956); *Logan Lanes, Inc. v. Brunswick Corp.*, Civil Action No. 4-66-5 (unpublished opinion, D. Idaho, May 26, 1966), *aff'd on other grounds*, 378 F.2d 212 (9th Cir. 1967), *cert. denied*, 389 U.S. 898, 88 S.Ct. 219, 19 L.Ed.2d 216 (1967); *Portland Retail Druggists Ass'n v. Abbott Laboratories*, Civil Action No. 71543 (unpublished opinion, D. Ore, September 11, 1972), *remanded on other issues*, 510 F.2d 486 (9th Cir. 1974), *remanded on other issues*, 425 U.S. 1, 96 S.Ct. 1305, 47 L.Ed.2d 537 (1976).

The legislative history of the Robinson-Patman Act demonstrates that it was not intended to apply to government purchases. 13a-14a; *Champaign-Urbana News, Etc. v. J. L. Cummins, supra* at 688 ("There is strong evidence in the legislative history that the Robinson-Patman Act Amendments were not intended to include purchases by the federal government."). The partial excerpt from House hearings quoted by petitioner (p. 7) confirms that "competitive bidding on Government orders" — including States, cities and municipalities — would not be eliminated by the bill. The opinion below also relied upon another excerpt from the House hearings, not quoted by petitioner, which reveals Congress' understanding that the absence of an express provision to limit government bidding precludes coverage of such transactions as a matter of statutory construction. (14a); *Hearings Before the House Committee on Judiciary on Bills to Amend the Clayton Act,* 74th Cong., 1st Sess. 250 (1935).

III. In View of Repeated Congressional Rejection of Petitioner's Position, Its Arguments Should be Addressed to Congress

Finally, petitioner's reliance on a purported effect on competition is not a valid reason for expanding the coverage of the Robinson-Patman Act. As was stated recently in *Great A&P Tea Co. v. FTC,* 440 U.S. 69, 79 (1979), "[r]ecognizing that 'this Court is not in a position to review the economic wisdom of Congress,' . . . '[w]e cannot supply what Congress studiously omitted.'" *See Champaign-Urbana News, supra* at 688.

In view of the consistent interpretation and application of the Act to the contrary during the past forty-five years, petitioner's policy arguments should be addressed to Con-

gress. Indeed since the Act became law, Congress has at least twice rejected proposed legislation to amend the Act to cover government purchases, specifically by "the United States, any State or political subdivision thereof." H.R. 4452, 82nd Cong., 1st Sess. (1951); H.R. 3377, 83rd Cong., 1st Sess. (1953). Such Congressional refusals to extend a statute are strong evidence of its intent not to cover such activities. *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 199-201 (1974); *see also Flood v. Kuhn*, 407 U.S. 258, 285 (1972); *FTC v. Ruberoid Co.*, 343 U.S. 470, 478-79 (1952); *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 351-52 (1941). Accordingly, the Fifth Circuit in this case, and the Seventh Circuit in *Champaign-Urbana News, supra* at 688, properly relied on these subsequent Congressional rejections as grounds for refusing to judicially expand the Act. It also is significant that the two amendments were proposed by Representative Patman, a co-sponsor of the Act, who has maintained that the Act did not apply to purchases by governmental institutions. W. Patman, *The Robinson-Patman Act* (1938), p. 168; W. Patman, *Complete Guide to the Robinson-Patman Act* (1963), p. 30.

Federal, State and local agencies have relied over the years on the consistent interpretation of the courts, enforcement authorities and Congress that the Robinson-Patman Act does not cover their purchasing procedures. To now consider a judicial reinterpretation of that coverage would unfairly expose those who have so relied to treble damage actions, as well as impose added burdens on the federal courts. The purchasing of government supplies, including those in this case (11a), is subject to extensive federal, state and local mandatory bidding procedures, designed to lower costs to taxpayers, which would be thrown into disarray by the statutory extension sought here. Any reconsideration of Congress' explicit rejection of expanding the

scope of the Robinson-Patman Act to cover government purchases should be left to Congress.

Accordingly, petitioner has failed to advance any special or important reason for the grant of certiorari.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David Klingsberg, Attorney for Respondent, Charles Pfizer & Co., Inc., and on behalf of Respondents on Brief, and a Member of the Bar of The Supreme Court of the United States, do hereby certify that on the 2nd day of December, 1981, I served three copies of the foregoing Brief in Opposition, by placing the same in the United States Mail, with First Class postage, prepaid in a duly addressed envelope, to Joe L. Tucker, Esquire, 1610-4th Avenue, North, Bessemer, Alabama 35020, Attorney for Petitioner, Jefferson County Pharmaceutical Association, Inc.; John J. Coleman, Jr., Esquire, and Linda Friedman, Esquire, Bradley, Arant, Rose & White, 1400 Park Place Tower, Birmingham, Alabama 35203, Attorney for the Board of Trustees for the University of Alabama; and Edwin A. Strickland, Esquire, County Attorney, Jefferson County Courthouse, Birmingham, Alabama 35203, Attorney for Cooper Green Hospital.

It is further certified that all parties required to be served have been served.

This the 2nd day of December, 1981.

David Klingsberg

Opposition

2

No. 81-827

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.,

Petitioner,

v.

ABBOTT LABORATORIES, a corporation; CIBA-GEIGY CORPORATION, a corporation, d/b/a CIBA Pharmaceutical Company; AMERICAN CYANAMID CO., a corporation, d/b/a Lederle & Labs. Division; PARKE-DAVIS & CO., a corporation; CHARLES PFIZER & CO., INC., a corporation, formerly known as E. R. SQUIBB & SONS, INC., d/b/a Squibb Pharmaceutical Company; THE UPJOHN CO., a corporation; AMERICAN HOME PRODUCTS CORP., a corporation, d/b/a Wyeth Laboratories and d/b/a Ayerst Laboratories; BRISTOL-MYERS COMPANY, a corporation, d/b/a Bristol Laboratories; MERCK SHARP & DOHME ORTHOPEDICS COMPANY, INC., a corporation; HOFFMAN-LA ROCHE, INC., a corporation; G. D. SEARLE & CO., a corporation, d/b/a Searle Laboratories; TRAVENOL LABS, INC., a corporation, d/b/a Flint Laboratories; THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, d/b/a University of Alabama Hospital Pharmacy and Russell Ambulatory Center Pharmacy; COOPER GREEN HOSPITAL, a non-profit corporation, d/b/a Cooper Green Hospital Pharmacy,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Brief of the Board of Trustees of the University of Alabama In Opposition to the Petition For a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Court of Appeals correctly reject a construction of the Robinson-Patman Act which would prohibit sales of pharmaceuticals at favorable prices to a state where such construction is unsupported by any substantive manifestation of Congressional intent, in favor of a construction of the Act which is consistent with thirty years of judicial precedent and with the Tenth Amendment to the United States Constitution?

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The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Robinson-Patman Act, 15 U.S.C. §13 (a) (1976) (Appendix B to Petition, p. 24a n.1) 2, 3

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All contracts of whatever nature for labor, services or work or for the purchase or lease of materials, equipment, supplies or other personal property, involving $2,000.00 or more made or on behalf of any state department, board, bureau, commission, committee, institution, corporation, authority or office shall, except as otherwise provided in this article, be let by free and open competitive bidding, on sealed bids, to the lowest responsible bidder.

Section 41-16-21(b), (c), Code of Alabama (1975) (Supp. 1981) 4

(b) All educational and eleemosynary institutions governed by a board of trustees or other similar governing body and the state docks department shall be exempt from the provisions of this article which relate to the powers, duties, authority, restrictions and limitations conferred or imposed upon the department of finance, division of purchases and stores; provided, however, that the said educational and eleemosynary institutions, the state docks department and the other state agencies exempted from the provi-

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sions of this article or any part hereof shall let by free and open competitive bidding on sealed bids to the lowest responsible bidder all contracts of whatever nature for labor, services or work or for the purchase or lease of materials, equipment, supplies or other personal property involving $2,000.00 or more. The said institutions, departments and agencies shall establish and maintain such purchasing facilities as may be necessary to carry out the intent and purpose of this article by complying with the requirements for competitive bidding in the operation and management of each such institution, department or agency.

(c) Contracts entered into in violation of this article shall be void.

No. 81-827

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.,
Petitioner,

v.

ABBOTT LABORATORIES, a corporation, et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Brief of the Board of Trustees of the University of Alabama In Opposition to the Petition For a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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STATEMENT OF THE CASE

We refer to the opinion of the Court of Appeals below, reported at 656 F.2d 96 (5th Cir. 1981), adopting the opinion of the District Court, for a statement of the relevant facts (Petitioner's Appendix A). As the opinion recites, one of the governmental purchasers named as a defendant in this action is the Board of Trustees of the University of Alabama, which is an integral part of the State of Alabama and through which the State operates hospitals, clinics and

pharmacies in conjunction with a school of medicine. One important basis for the refusal of the Courts below to apply the Robinson-Patman Act to this defendant was its status as a sovereign state.

REASONS FOR DENYING THE WRIT

There are no special or important reasons for granting the writ of certiorari. Sup. Ct. Rule 17.

1. The decision below is neither one of first impression nor in conflict with any decision of the United States Supreme Court or of any other court.

2. The decision below properly refused to adopt a novel construction of the Robinson-Patman Act which would give rise to serious questions regarding Congress' intent to regulate the States, in the context of the Tenth Amendment to the United States Constitution.

ARGUMENT

1. The Decision Below Is Neither One of First Impression Nor in Conflict with Any Decision of the United States Supreme Court or Any Other Court.

The first reason advanced by petitioner as a ground for granting the writ — that the decisions below conflict with the holding of this Court in *Abbott Laboratories v. Portland Retail Druggist Association, Inc.*, 425 U.S. 1 (1976) — is patently wrong. The issue decided below — that the Robinson-Patman Act was not intended to apply to governmental purchases — was not before the United States Supreme Court in *Abbott Laboratories*. The district court in *Abbott Laboratories* had held (just as the Fifth Circuit Court of Appeals has held in this case), that governmental purchases were outside the scope of the Act, and this ruling

was not appealed. *Id.* at 4, n.2 (noting without disapproval district court's dismissal of claims against federal, state and local governments).

The second reason advanced by petitioner in support of the writ — that the case is one of first impression — belies petitioner's claim that the decision conflicts with the holding in *Abbott Laboratories.* Although the United States Supreme Court has never decided the issue presented here, other courts have addressed the issue over a period of thirty years. In addition to the decision of the District Court of Oregon in *Abbott Laboratories, supra,* the following cases considered this issue, and none of them held governmental purchases to be subject to the Act: *Champaign-Urbana News Agency, Inc. v. J. L. Cummins News Co.,* 632 F.2d 680 (7th Cir. 1980); *Logan Lanes, Inc. v. Brunswick Corporation,* ... F.Supp. ... (unpublished opinion, Civil Action No. 4-66-5, D. Idaho May 26, 1966), *aff'd on other grounds,* 378 F.2d 212 (9th Cir. 1967), *cert. den.* 389 U.S. 898 (1967); *Sachs v. Brown-Forman Distillers Corp.,* 134 F. Supp. 9, 16 (S.D.N.Y. 1955), *aff'd per curiam,* 234 F.2d 959 (2d Cir. 1956); *General Shale Products Corp. v. Struck Construction Co.,* 37 F. Supp. 598, 602 (W.D. Ky. 1941), *aff'd on other grounds,* 132 F.2d 425 (6th Cir. 1942), *cert. den.* 318 U.S. 780 (1943).[1]

Accordingly, there is no conflict among the courts or other authorities nor is there any conflict between the de-

[1]Not only are the decisions below uniformly supported by the courts but they are also consistent with the view expressed by the Attorney General of the United States at the time of the enactment of the Robinson-Patman Act, 38 Opp. Att. Gen. 539, 1932-39 CCH Trade Cases ¶ 55,145 (Dec. 28, 1936), which view was reaffirmed by Attorney General Kennedy, *Report Under Executive Order 10936 on Identical Bidding in Public Procurement* (1962), and with interpretations by one of the co-sponsors of the Act, Representative Wright Patman, W. PATMAN, THE ROBINSON-PATMAN ACT, p. 168 (1938); W. PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT, p. 30 (1963).

cisions below and any decision of the United States Supreme Court.

2. The Decision Below Properly Refused to Adopt a Novel Construction of the Robinson-Patman Act Which Would Give Rise to Serious Questions Regarding Congress' Intent to Regulate the States In the Context of the Tenth Amendment to the United States Constitution.

Petitioner's third reason for granting the writ — that the decision below is unjust because it permits the State of Alabama to compete with private enterprise — is also mistaken. Petitioner is surely wrong to suggest that a "fair" result in this case would be to subject state purchases of pharmaceuticals to the Robinson-Patman Act. Such a result would be unfair not to petitioner but to the State and its citizens, who would thus be deprived of benefits incidental to the promotion of the public welfare in order to benefit materially one segment of private enterprise. Even more important, it could deprive the state of its freedom, preserved by the Tenth Amendment to the United States Constitution, to structure integral operations in areas of its traditional governmental functions, including those incident to the promotion of the public welfare and education of its citizens.

Such an application of the Act to the State of Alabama here would emasculate this State's statutory policy to obtain the lowest price possible for its pharmaceutical purchases[2] and would interfere with the operation of its state hospital and university. The court below correctly reasoned, there-

[2]Competitive bidding is required by §§ 41-16-20, 41-16-21 (b), Code of Alabama (1975). § 41-16-21 (c), as did its predecessor section, provides that "[c]ontracts entered into in violation of this article shall be void." The legislative intent in passing this article was to ensure that authorities like the Board buy drugs "at the lowest possible price," *White v. McDonald Ford Tractor*, 287 Ala. 77, 248 So.2d 121 (1971).

fore, that the constitutional considerations discussed in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which resulted in rejection of a federal statute specifying minimum prices to be paid by the State for labor, are "no less cogent when deciding whether another federal statute should be interpreted to specify minimum prices to be paid by governmental bodies for goods . . ." (Petitioner's Appendix, p. 21a).

Because a construction of the Robinson-Patman Act that would apply it to the States would, at the very least, present a significant risk that the Act would violate the Tenth Amendment to the United States Constitution, such a construction should not be adopted absent a "clear expression of an affirmative intention of Congress" that the Act apply to the States. *National Labor Relations Board v. The Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979).[3]

There is no such clear expression of Congressional intent to subject State purchases to the Robinson-Patman Act. The isolated excerpt from Congressional hearings cited in the Petition For a Writ of Certiorari in which Mr. Teegarden hypothesized that city hospitals might be subject to the Act (Petition, p. 8) does not reveal any intent to subject a *state* to the Act. Moreover, a subsequent written statement submitted to the House Judiciary Committee by Mr. Teegarden,[4] although arising in the context of competitive bidding (the method by which the State of Alabama purchases most of its drugs), clearly indicates that all sovereign purchases are exempt because the statute does not

[3]Although the constitutional rights threatened in *Catholic Bishop of Chicago* arose under the First Amendment, the opinion did not distinguish among the several constitutional provisions for purposes of its rule of statutory construction. A risk of infringing *any* constitutional value would mandate a search for a clear expression of Congressional intent to intrude into the area potentially protected by the Constitution.

[4]Would the bill prevent competitive bidding on government purchases below trade price levels?

expressly limit the right of government to make purchases at the lowest possible prices. Congress thus understood the Act at the time of its passage not to regulate purchases by governments, such as the State of Alabama. And, on at least two occasions subsequent to enactment of this law, Congress failed or refused to pass the proposed amendments which would have brought sales to governmental institutions within the coverage of the Robinson-Patman Act, H.R. 4452, 83d Cong., 1st Sess. (1951); H.R. 3377, 83d Cong., 1st Sess. (1953).

Petitioner would have this Court achieve via judicial construction a result which Congress repeatedly and expressly rejected both at the inception of the Act and subsequently through the years. Far from creating an "unjust" result, the decision below properly avoided presuming a Congressional intent that was never expressed (and indeed never existed) as well as a construction of the Act that would raise difficult and serious constitutional questions under the Tenth Amendment to the United States Constitution. The Fifth Circuit thus adopted the construction of the Act which avoids upsetting nearly 40 years of state competitive bidding practices and avoids disruption of Alabama's operation of its hospital and medical school.

This question was raised by a member of the committee at the hearing. The answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives, or privileges of the sovereign unless it so expressly provides — a principle inherited by American jurisprudence from common law.

Hearings Before the House Committee of the Judiciary on Bills to Amend the Clayton Act, 74th Congress, 1st Sess. 250 (1935).

CONCLUSION

Petitioner has failed to advance any special or important reason for the grant of certiorari. Accordingly, it is respectfully submitted that the Petition should be denied.

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Petitioner's Brief

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QUESTIONS PRESENTED

1. Are sales made to state and local agencies ordinarily exempt *per se* from the proscriptions of the *Robinson-Patman Act*?

2. If sales to state and local government agencies are ordinarily exempt *per se* from the proscriptions of the *Robinson-Patman Act,* does that general exemption extend to sales to state or local government agencies which compete in the public marketplace with privately-owned business enterprises?

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Petitioner,

v.

ABBOTT LABORATORIES, A CORPORATION; CIBA-GEIGY CORPORATION, A CORPORATION, D/B/A CIBA PHARMACEUTICAL COMPANY; AMERICAN CYANAMID CO., A CORPORATION, D/B/A LEDERLE & LABS. DIVISION; PARKE-DAVIS & CO., A CORPORATION; CHARLES PFIZER & CO., INC., A CORPORATION, D/B/A PFIZER LABORATORIES; OLIN CORPORATION, FORMERLY KNOWN AS E. R. SQUIBB & SONS, INC., D/B/A SQUIBB PHARMACEUTICAL COMPANY; THE UPJOHN CO., A CORPORATION; AMERICAN HOME PRODUCTS CORP., A CORPORATION, D/B/A WYETH LABORATORIES AND D/B/A AYERST LABORATORIES; BRISTOL-MYERS COMPANY, A CORPORATION, D/B/A BRISTOL LABORATORIES; MERCK SHARP & DOHME ORTHOPEDICS COMPANY, INC., A CORPORATION; HOFFMAN-LA ROCHE, INC., A CORPORATION; G. D. SEARLE & CO., A CORPORATION, D/B/A SEARLE LABORATORIES; TRAVENOL LABS, INC., A CORPORATION, D/B/A FLINT LABORATORIES; THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA HOSPITAL PHARMACY AND RUSSELL AMBULATORY CENTER PHARMACY; COOPER GREEN HOSPITAL, A NON-PROFIT CORPORATION, D/B/A COOPER GREEN HOSPITAL PHARMACY; ABC CORP. AND XYZ CORP., WHOSE IDENTITIES ARE UNKNOWN AT THIS TIME TO THE PLAINTIFFS, BUT WILL BE ADDED BY AMENDMENT WHEN ASCERTAINED,

Respondents.

BRIEF OF PETITIONER ON THE MERITS

OPINIONS BELOW

The Court of Appeals for the Fifth Circuit confirmed judgment and opinion of the United States District Court for the Northern District of Alabama without opinion on the basis of the memorandum of opinion rendered by the United States District Court for the Northern District of Alabama. The judgment of the Court of Appeals is not yet reported, however, and appears as Appendix "A" in Petitioner's Petition for Writ of Certiorari which was filed in this Court on October 30, 1981. The Honorable Thomas A. Clark, Circuit Judge, offered a dissenting opinion which is not yet reported and which appears as Appendix "B" in Petitioner's Petition for Writ of Certiorari filed with this Court on October 30, 1981.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered on August 31, 1981. The jurisdiction of this Court is envoked pursuant to 28 U.S.C. § 1254(1), this Honorable Court having granted the Petition for Writ of Certiorari on March 8, 1982.

STATUTORY PROVISIONS

The *Robinson-Patman Act,* 15 U.S.C. 13(a) and 13c:

> **15 U.S.C. § 13. Discrimination in price, services, or facilities**
>
> (a) Price; cost justification; quantity limits; selection of customers; changing market conditions. It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of

like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting

the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

§ 13c. Exemption of nonprofit-making institutions from operation of Robinson-Patman Act

Nothing in the Act approved June 19, 1936 (Public, Numbered 692, Seventy-fourth Congress, second session), known as the Robinson-Patman Anti-discrimination Act 15 USCS §§ 13 et seq., shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

(May 26, 1938, c. 283, 52 Stat. 446.)

STATEMENT OF CASE

A. Proceedings in District Court

Suit was brought by the Jefferson County Pharmaceutical Association, Inc., a non-profit corporation which is comprised of pharmacists throughout Jefferson County, Alabama. The suit alleged that fifteen different drug manufacturers (named in the style of this case) were selling drugs to the University of Alabama Pharmacy and Russell Ambulatory Center Pharmacy (both subdivisions of the University of Alabama Medical Center) and Cooper Green Hospital Pharmacy (a county hospital) at discriminatory "bid prices" and that these pharmacies, operating as agencies of the state of Alabama and Jefferson County, were selling drugs procured by "bid purchasing" to the general public in direct

competition with privately owned pharmacies (2a). Petitioner's complaint further alleged that sales by these pharmacies are in violation of the *Robinson-Patman Act,* 15 U.S.C. § 13 (6a). The Petitioner in its complaint sought injunctive relief and monetary damages for compensation of injuries suffered as a result and consequence of violations of the proscriptions of the *Robinson-Patman Act.*

All respondents filed motions to dismiss Petitioner's complaint, stating as grounds for dismissal, among other things, that sales of goods made to a governmental agency or instrumentality are exempt as a matter of law from the sanctions of the *Clayton Act* as amended by the *Robinson-Patman Act,* 15 U.S.C. § 13 (17a-50a).

The District Court held "that governmental purchases are, without regard to 15 U.S.C. § 13c, beyond the intended reach of the *Robinson-Patman Price Discrimination Act* . . . ." The District Court accepted the argument of the respondents saying that although sales to governmental institutions were not specifically treated by the explicit exemption found in 15 U.S.C. § 13c, but there exists an *implicit* exemption for sales to governmental agencies irregardless of whether or not they have entered the retail pharmacy business in direct competition with private enterprise.

B. Proceedings in the Court of Appeals

The Jefferson County Pharmaceutical Association, Inc., appealed the decision of the District Court and the Court of Appeals for the Fifth Circuit confirmed the decision of the District Court without opinion. (Appendix "A" of Petitioner's Petition for Writ of Certiorari filed in this Court on October 30, 1981.) The Honorable Thomas A. Clark, Circuit Judge, dissented and filed an

opinion stating that the decision of the majority was in conflict with *Abbott Laboratories v. Portland Retail Druggists, Inc.*, 425 U.S. 1, 96 S. Ct. 1305 (1976). (Appendix "B" of Petitioner's Petition for Writ of Certiorari filed in this Court on October 30, 1981, at page 24a.)

SUMMARY OF ARGUMENT

The *Robinson-Patman Act* contains no reference to any exemptions other than the non-profit institution exemption found in 15 U.S.C. § 13c. There is no explicit exemption in favor of sales to state or local government agencies on the face of the Act and to hold otherwise would amount to an expansion of the exemption which appears on the face of the Act.

In construing statutes, the courts are constrained to ascertain and declare the intent of the Congress. Although the legislative history of a statute may be resorted to as an aid in interpreting an ambiguous statute, the legislative history may not be resorted to where a statute is clear and unambiguous on its face. If the legislative history is reached in this case, the history strongly indicates that Congress did not intend to exempt from the proscriptions of the *Robinson-Patman Act*, sales to state or local government agencies where those agencies are competing in the public marketplace with privately-owned tax-paying business enterprises.

ARGUMENT

ISSUE I

ARE SALES MADE TO STATE AND LOCAL GOVERNMENT AGENCIES ORDINARILY EXEMPT *PER SE* FROM THE PROSCRIPTIONS OF THE *ROBINSON-PATMAN ACT*?

The *Robinson-Patman Act,* 15 U.S.C. § 13c *et seq.* does not state whether or not it applies to sales to state and local government agencies. In fact, the Act does not mention such sales. The only exemption from proscriptions of the act is that for non-profit institutions contained in 15 U.S.C. § 13c, which states:

> Nothing in the . . . Robinson-Patman Antidiscrimination Act . . . shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

Petitioner asserts that both the language and meaning of this exemption is clear and without ambiguity. Petitioner further asserts that since Congress addressed the questions of exemptions when it adopted the exemption for sales to non-profit institutions, that Congress, speaking clearly and succinctly, did not see fit to include an exemption for sales to state and local government agencies. There is no ambiguity as to this point in the *Robinson-Patman Act* and, therefore, there is no need to resort to the legislative history of the Act to see whether or not Congress intended to exempt sales to state and local government agencies from the proscriptions of the Act.

The face of the Act is very clear, and contains no exemption in favor of sales to state and local government agencies. Thus, there may be no resort to the legislative history of a statute, the language of which is plain and

unambiguous. The legislative history may be resorted to only for the purpose of resolving doubt, not for the purpose of creating doubt. *Ex parte Collett,* 337 U.S. 55 (1949), and *United States v. Missouri Pacific R. Co.,* 278 U.S. 269 (1928).

If there is any exemption in favor of sales to state and local government agencies, it must be an exemption founded on the non-profit institution exemption of 15 U.S.C. § 13c, as interpreted by the Supreme Court in the recent case, *Abbott Laboratories v. Portland Retail Druggists Association,* 425 U.S. 1 (1976). In this case Petitioner is willing to acknowledge an exemption in favor of the defendant pharmacies if those pharmacies would operate under the limitations and restrictions of 15 U.S.C. § 13c as defined in *Abbott Laboratories v. Portland Retail Druggists Association, supra.* However, the defendant pharmacies are not limiting their sales to those persons who fall within the definition and limitation of the exemption set out by this Court in *Abbott,* at 425 U.S. at 9 through 12.

To recapitulate, Petitioner's position as to Issue I is that the statute is clear and unambiguous, and the legislative history need not and may not be resorted to. Because the Act is clear, there is but one exemption from its proscriptions and provisions and that is for non-profit institutions pursuant to 15 U.S.C. § 13c. Thus, the plain words and meaning of the Act cannot be overcome by a legislative history which may furnish uncertain basis for inferences in every direction. *Gemsco, Inc. v. Walling,* 324 U.S. 244 (1945).

Petitioner is certain that defendants will argue that the *Robinson-Patman Act* is vague or ambiguous such that resort to the legislative history of the Act is necessary to decide if sales to state and local government agencies

are subject to the proscriptions of the Act. Therefore, in an effort to obviate the necessity of a lengthy reply brief, the legislative history will be reviewed and discussed here.

When Congress had under consideration the *Robinson-Patman Act,* several members questioned the effect of this legislation upon governmental purchases. Members of Congress at the hearings wanted to make certain that the Federal government, primarily, would not be limited by the Act when purchasing goods. Congress assumed that the government is not and would not be at any time in competition with private enterprise when it is purchasing goods for its own consumption. This assumption of non-competition is illustrated graphically in testimony given before the House Judiciary Committee by H. B. Teegarden, the author of the *Robinson-Patman Act.* The pertinent part of the questioning and responses is as follows:

> MR. LLOYD: Would this bill, in your judgment, prevent the granting of discounts to the United States Government?
>
> MR. TEEGARDEN: Not unless the present Clayton Act does so. So far as that problem is concerned, it is no different from that which exists under the present Clayton Act.
>
> MR. LLOYD: For instance, the Government gets huge discounts. Take that electric fan, for instance. You go to the ordinary store and the list price is $35. The Procurement Division procures them delivered, one at a time, for $13.18. Now, would that discount be barred by this bill?
>
> MR. TEEGARDEN: I do not see why it should, unless a discount contrary to the present bill would be barred—that is, the present law—would be barred by that bill.

> Aside from that, my answer would be this: The Federal Government is not in competition with other buyers from these concerns. Therefore a discrimination—it is so applied universally in interstate commerce law, in the railroad law—to have a discrimination, there must be a relative position between the parties to the discrimination which constitutes an injury to one as against the other. I think the answer is to be found in that.
>
> In other words, if seller A makes a price to a retailer in New York and a different price to a retailer in San Francisco, all other things aside, no case of discrimination could be predicated there, because the two are not in the same sphere at all.
>
> The Federal Government is saved by the same distinction, *not of location but of function. They are not in competition with anyone else who would buy.* [Emphasis added.]

Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act, 74th Cong., 1st Sess., 208-09 (hereinafter cited as *Hearings*).

The *Robinson-Patman Act* seeks to discourage or eliminate unfair price discrimination. If the decision of the Court of Appeals (Appendix A, Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, No. 81-827, at page 1a) is allowed to stand, thus creating an exemption not contained in the Act the intent of Congress to eliminate unfair competition, will be completely abrogated. Further, by allowing the creation of such an exemption, university hospitals and state and local government agencies can and will enter into all sectors of private enterprise and could in fact destroy numerous enterprises throughout this country. This was not the intent of Congress.

Thus, if Your Honors choose to delve into the analysis of the Act, then Your Honors can certainly find support in the legislative history for holding that there does not exist a general *per se* exemption that removes sales to state and local governments from the proscriptions of the Act.

ISSUE II

IF SALES TO STATE AND LOCAL GOVERNMENT AGENCIES ARE ORDINARILY EXEMPT *PER SE* FROM THE PROSCRIPTIONS OF THE *ROBINSON-PATMAN ACT*, DOES THAT GENERAL EXEMPTION EXTEND TO SALES TO STATE OR LOCAL GOVERNMENT AGENCIES WHICH COMPETE IN THE PUBLIC MARKETPLACE WITH PRIVATELY-OWNED BUSINESS ENTERPRISES?

It is hoped that Your Honors will not deem it necessary to reach this issue, that Your Honors will have decided that there is no need to resort to the legislative history. However, Petitioner will discuss this issue, in the event Your Honors deem it necessary to resort to the legislative history of the Act to ascertain the intent of the Congress.

While the legislative history of the Act can support the proposition that there is a general exemption removing the price discrimination proscriptions of the *Robinson-Patman Act* from sales to state and local government agencies, that same legislative history just as strongly (perhaps more strongly) supports the position that there is no exemption in favor of state or local government agencies which compete with privately-owned businesses. Witness the following, which is a continuation of Mr. Representative Hancock's above-quoted questioning of Mr. Teegarden:

MR. HANCOCK: *Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?*

MR. TEEGARDEN: I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. *If the two hospitals are in competition with each other, I should say that the fact that one is operated by the city does not save it from the bill.* If they are not in competition with each other, then they are in a different sphere. * * *

Hearings, p. 209 (emphasis added).

Although opinions of the Attorney General of the United States and of several states may be resorted to for help in construing ambiguous statutes, such opinions obviously do not constitute binding authority. This is especially true where an Attorney General is saying that sales to his state's agencies or the nation's agencies are exempt from the proscriptions of the *Robinson-Patman Act*. After all, there would be a natural, inherent leaning towards protecting one's own pocketbook—and there are several opinions by the United States and several states' attorneys general to the effect that the Act does not apply to sales to national, state or local government agencies. Yet, in the face of the obvious pressures to protect one's own home state agencies from the provisions of the Act, several states' attorneys general have held that the proscriptions of the Act do apply to sales to state and local government agencies.

The Supreme Court of the United States has recognized that the Clayton Act prior to its amendment in June, 1936, was applicable to government contracts. *International Business Machines Corp. v. United States* (U.S. Sup. Ct., 1936), 298 U.S. 131, ... In that case the court held that certain

> provisions contained in leases of tabulating and other machines to the federal government were in violation of the Clayton Act. We therefore conclude that the *Robinson-Patman Act* would not be held inapplicable in cases where there would otherwise be a violation of the Act merely because the acts constituting the violation occurred in connection with a government contract, federal, State or municipal. *Opinion of the Attorney General of California,* 1932-1939 Trade Cases ¶ 55,156 (Feb. 26, 1937).

In addition, the Attorney General of the State of Georgia has given an opinion holding that even though a state is a sovereign body with certain regulatory powers over business and is thus not ordinarily a "person" within the meaning of that word as used in the *Robinson-Patman Act,* a state could, however, lose its sovereignty and could become subject to the restrictions of the Act when that state, through its institutions, assumes to act as a private business, or in a proprietary capacity. *Opinion of the Attorney General of Georgia,* 1948-1949 Trade Cases ¶ 62,455 (June 14, 1949).

What Petitioners seek to do here is to have commercial activities operated by state and local government agencies held to the same standard as privately-owned commercial enterprises. This is not a new concept. See: *United States v. California,* 297 U.S. 175 (1935); *Bank of Kentucky v. Wisten,* 2 Pet. 318 (1829); *Bank of the United States v. Planters Bank of Georgia,* 9 Wheat. 904, 6 L. Ed. 244 (1824); and much more recently *City of Layfayette, La. v. Louisiana Power & Light* (U.S. Sup. Ct., No. 76-864, March 29, 1978), 55 L. Ed. 2d 364.

Thus, if Your Honors go beyond the actual language of the *Robinson-Patman Act* and decide that there is a general exemption *per se* excluding sales to state and

local government agencies from the proscriptions of the Act, it is respectfully submitted that such an exemption should not be allowed to extend to or operate in favor of state and local government agencies which operate retail-level enterprises which compete with privately-owned, taxpaying businesses in the public marketplace. All persons, firms, corporations or governmental agencies which compete with each other for business in the public marketplace should all be subject to the Federal anti-trust laws, and sales to all of them should be subject to the price discrimination proscriptions of the *Robinson-Patman Act.* After all, at all levels of government, Federal, state and local,

> the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression.

Alabama Constitution, Article 1, § 35. Petitioner seeks no special treatment from this Court. Petitioner, in asking that *all* of its competitors (whether privately or publicly owned) be forced to comply with the same laws regarding competition and pricing as its assignors, seeks only equal application of the law.

Construction of the statute such that it would support an exemption in favor of state-supported activities would and could hold true only where the state or local government was functioning as a consumer rather than as a competitor. Petitioner does not seek to eliminate competitive bidding for governmental agencies so long as those agencies use those items purchased by competitive bidding for their own use and not for resale to the general public in competition with private enterprise as the defendant hospital pharmacies are doing in this case. Indeed, Mr. Teegarden, author of the *Robinson-Patman*

Act, advised the members of the House Committee that competitive-bid purchasing and resale by municipal hospitals would be covered and fall within the proscriptions of the Act. When he was questioned as to how far state and local government liability would extend under the Act, H. B. Teegarden gave the only testimony which can be found in the consideration of the *Robinson-Patman Act* which is relevant or material to the question for this Court. Mr. Teegarden's explanation and testimony on this point was as follows:

> MR. HANCOCK: It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?
>
> MR. TEEGARDEN: You mean competitive bidding on Government orders?
>
> MR. HANCOCK: Government, State, city, municipality.
>
> MR. TEEGARDEN: No; I think not.
>
> MR. MICHENER: If it did do it, you would not want it, would you?
>
> MR. TEEGARDEN: No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.
>
> MR. HANCOCK: You would have to bid to the city, county, exactly the same as anybody else; same quantity, same price, same quality?
>
> MR. TEEGARDEN: No.
>
> MR. HANCOCK: *Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?*
>
> MR. TEEGARDEN: I would have to answer it this way. In the final analysis, it would depend upon numerous questions of fact in a particular case.

> *If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill. If they are not in competition with each other, then they are in a different sphere.*

Hearings, supra, at p. 209 (emphasis added).

Thus, if Congress intended exemption, such an exemption was intended to cover purchases for government consumption only. Congress did not intend to sanction anti-competitive bid purchasing by governmental agencies for the purpose of those agencies competing with private enterprise. Congress did not envision governmental agencies entering the retail market for pharmaceutical drugs or any other consumer item.

It is not the function of the government of the state of Alabama to sell drugs to the general consuming public. Nowhere in the statutes of the state of Alabama (Code of Alabama, 1975) is there any statute that allows any state agency to enter into this market. The retail sale of drugs to the consuming public in the state of Alabama is not a state function.

Certainly, private retail pharmacies cannot compete with pharmacies that are agencies of the state of Alabama and Jefferson County. If those governmental agencies so desired, they could in fact (and very well may if the decisior of the Court of Appeals is allowed to stand) destroy and eliminate competition in the retail drug market in the Birmingham and Jefferson County area.

The anti-trust laws and, in particular, the *Robinson-Patman Act* should be construed liberally or broadly so as to effectuate and accomplish its purposes, to deter unfair price discrimination. Further, the exemptions should be construed strictly or narrowly. *United States v. McKesson and Robbins,* 351 U.S. 305, 316, 76 S. Ct.

937 (1956); *FMC v. Sea Train Lines, Inc.*, 411 U.S. 726, 93 S. Ct. 1773 (1973); *Abbott Laboratories v. Portland Retail Druggists, supra,* 425 U.S. at 11, 96 S. Ct. at 1313.

The existence of an overriding public policy is sufficient to overrule any presumption against state immunity from the application of the anti-trust laws which certainly includes the *Robinson-Patman Act. City of Layfayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 397, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978). In that case this Court *inter alia* stated: "a subordinate state body is not *ipso facto* exempt from the operation of the anti-trust laws." (Quoting from the opinion of the Court of Appeals for the Fifth Circuit). *City of Lafayette, supra.*

Thus, the fact that this Court has stated that the *Robinson-Patman Act* was enacted "to curb and prohibit all devices by which large buyers gained discriminatory preferences over small ones by virtue of their greater purchasing power" (*Abbott Laboratories v. Portland Retail Druggists, supra,* 47 L. Ed. 2d 537, p. 548) renders the decision of the Court of Appeals erroneous. Therefore, your Petitioner respectfully requests that this Honorable Court vacate the decision of the lower court.

CONCLUSION

It is respectfully submitted that Your Honors should vacate the Court of Appeals judgment and remand this cause to the United States District Court for the completion of discovery and a trial on the merits.

Your Petitioner respectfully requests that this Honorable Court decree that (1) there is no general exemption *per se* in the *Robinson-Patman Act* for sale to state and local government agencies, or (2) that, if there is a general exemption *per se* in the *Robinson-Patman Act*

for sales to state and local government agencies, that general exemption does not apply to situations where state or local government agencies compete in the public marketplace with privately-owned business enterprises.

Your Petitioner would respectfully request, further, that Your Honors apply the mandates of *Abbott Laboratories v. Portland Retail Druggists Association, Inc.*, 425 U.S. 1, 47 L. Ed. 2d 537, 96 S. Ct. 1305, to the purchases and sales of respondents.

Respectfully submitted,

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Respondent's Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.,

Petitioner,

—v.—

ABBOTT LABORATORIES, a corporation, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS ABBOTT LABORATORIES; CIBA-GEIGY CORPORATION; AMERICAN CYANAMID CO.; PARKE-DAVIS & CO.; CHARLES PFIZER & CO., INC.; E. R. SQUIBB & SONS, INC.; THE UPJOHN CO.; AMERICAN HOME PRODUCTS CORP.; BRISTOL-MYERS COMPANY; MERCK SHARP & DOHME ORTHOPEDICS COMPANY, INC.; HOFFMANN-LA ROCHE, INC.; G. D. SEARLE & CO.; AND TRAVENOL LABS, INC.

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QUESTION PRESENTED

Does the Robinson-Patman Act cover sales to governmental purchasers?[1]

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1 A disclosure statement similar to that required by Rule 28.1 of the Supreme Court Rules, as amended, was supplied to the Fifth Circuit in the Brief of Appellees pursuant to Local Rule 13(a). The Respondents joining in this brief supplied this Court with an updated listing of the information required by Rule 28.1, as amended, by letters dated December 7, 1981 from David Klingsberg, Esq., December 16 and 17, 1981 from J. Patrick Logan, Esq. and December 22, 1981 from Judson E. Tomlin, Jr., Esq. to the Clerk of this Court. Any changes from the aforementioned letters will be supplied to the Court.

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No. 81-827

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.,

Petitioner,

—v.—

ABBOTT LABORATORIES, a corporation, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS ABBOTT LABORATORIES; CIBA-GEIGY CORPORATION; AMERICAN CYANAMID CO.; PARKE-DAVIS & CO.; CHARLES PFIZER & CO., INC.; E. R. SQUIBB & SONS, INC.; THE UPJOHN CO.; AMERICAN HOME PRODUCTS CORP.; BRISTOL-MYERS COMPANY; MERCK SHARP & DOHME ORTHOPEDICS COMPANY, INC.; HOFFMANN-LA ROCHE, INC.; G. D. SEARLE & CO.; AND TRAVENOL LABS, INC.

This brief is submitted on behalf of respondents Abbott Laboratories, Ciba-Geigy Corporation, American Cyanamid Co., Parke-Davis & Co., Charles Pfizer & Co., Inc., E. R. Squibb & Sons, Inc., The Upjohn Co., American Home Products Corp., Bristol-Myers Company, Merck Sharp & Dohme Orthopedics Company, Inc., Hoffmann-La Roche, Inc., G. D. Searle & Co., and Travenol Labs, Inc.

OPINIONS BELOW

The Fifth Circuit affirmed the district court's decision on the basis of the district court's Memorandum of Opinion, dated December 1, 1978, a copy of which appears as an appendix to the Fifth Circuit decision, which is reported at 656 F.2d 92 (5th Cir. 1981).[2] The Honorable Thomas A. Clark, Circuit Judge, filed a dissenting opinion reported at 656 F.2d at 93-97.

STATUTORY PROVISIONS INVOLVED

The statutes at issue in this case are set forth in the Appendix at the end of this brief at 1A. These include Sections 2(a) and 2(f) of the Robinson-Patman Act, Pub. L. No. 74-692 (1936), 15 U.S.C. § 13 (1976). The Robinson-Patman Act was amended in 1938 by the Nonprofit Institutions Act, Pub. L. No. 75-550 (1938), 15 U.S.C. § 13c (1976), and the text of that amendment appears *infra* pp. 34-35 note 42.

STATEMENT OF THE CASE

1. Proceedings Below

The complaint in this action seeks treble damages and injunctive relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26 (1976), for alleged violations of Sections 2(a) and (f) of the Robinson-Patman Act, 15 U.S.C. §§ 13(a) and (f) (1976). (J.A. 2a-11a.)[3] Petitioner Jefferson County Pharmaceutical Association, Inc. (hereinafter "petitioner") is a trade association of retail pharmacists and pharmacies doing business in Jefferson County, Alabama. (J.A. 3a.) Petitioner, as assignee of the claims of its member pharmacies, commenced this action on August 7, 1978, naming as defendants

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2 The decisions below are hereinafter cited as 656 F.2d at __.

3 Joint Appendix of petitioner and respondents filed with this Court on April 22, 1982 (hereinafter referred to as "J.A. __").

fourteen pharmaceutical manufacturers (thirteen of whom are named in the title of this action)[4] (hereinafter collectively referred to as the "manufacturer respondents"); The Board of Trustees of the University of Alabama, d/b/a University of Alabama Hospital Pharmacy and Russell Ambulatory Center Pharmacy; Cooper Green Hospital, a nonprofit corporation, d/b/a Cooper Green Hospital Pharmacy; and ABC Corp. and XYZ Corp., whose identities were unknown to the plaintiff. (J.A. 3a-7a.) The defendants are respondents herein (hereinafter collectively referred to as "respondents").[5]

Respondent The Board of Trustees of the University of Alabama (the "Board") does business in Birmingham, Alabama as the University of Alabama Hospital Pharmacy and the Russell Ambulatory Center Pharmacy. (J.A. 6a.) The Board, which was organized pursuant to the Constitution of Alabama (Ala. Const. art. XIV, § 264) and constituted pursuant to the Code of Alabama (Ala. Code § 16-47-1, *et seq.* (1975)), acts on behalf of the State of Alabama. (J.A. 6a.)

Respondent Cooper Green Hospital of Jefferson County is a county hospital, existing as a public corporation incorporated pursuant to the Code of Alabama (Ala. Code §§ 22-21-70 to 22-21-83 (1975 & Supp. 1981)). (J.A. 6a.) It does business in Birmingham, Alabama as Cooper Green Hospital Pharmacy. (J.A. 6a.) Cooper Green Hospital, by statutory mandate, is required to provide medical care and treatment to indigent persons of the county, particularly "the furnishing of drugs and medicine to such indigent persons, including out-patient care at the county hospital." 1965 Ala. Acts 388, § 12.

Petitioner claims that the respondent manufacturers violated Section 2(a) of the Act by selling their products to the University of Alabama Hospital Pharmacy, Russell Ambulatory Center Pharmacy, and Cooper Green Hospital Pharmacy, all of

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4 One of the originally named defendants, Burroughs Wellcome & Co. (U.S.A.), Inc., was dismissed from the suit because it made no sales to petitioner's assignors.

5 Two amendments to the complaint were subsequently filed on August 30, 1978 and September 25, 1978, respectively. (J.A. 12a-16a.)

which are governmental agencies, at prices lower than the prices at which they sold like products to petitioner's assignors. (J.A. 7a-9a.) Petitioner further claims that the governmental purchasers knowingly induced such lower prices in violation of Section 2(f) of the Act. (J.A. 9a-10a.) As a result of these alleged violations, petitioner's assignors claim to have been injured. (J.A. 8a-11a.)

2. The District Court's Opinion

Defendants moved to dismiss the amended complaint for failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (J.A. 17a-52a.) The district court (Hon. Sam C. Pointer, Jr.) entered a Memorandum of Opinion and order on December 1, 1978 granting defendants' motion on the ground that:

> "governmental purchases are . . . beyond the intended reach of the Robinson-Patman Price Discrimination Act . . . ." 656 F.2d at 102.

The district court commenced its discussion by noting that the question before it "is essentially one of statutory construction," 656 F.2d at 99, and that defendants contend that "governmental purchases are beyond the intended reach of Robinson-Patman." 656 F.2d at 100. The court then reviewed "interpretations to that effect expressed prior to enactment by [the statute's] chief draftsman and reiterated over a period of the following four decades by its chief sponsor, by other commentators, by government officials, and by all the courts that have addressed the question." 656 F.2d at 100.

For legislative history, Judge Pointer relied on the explanation provided to the House Judiciary Committee by H.B. Teegarden, author of the bill, that the proposed legislation would not require bidding to federal, state and municipal buyers on the same basis as to private purchasers. The court also cited Teegarden's written report to the committee assuring it that "absent express provisions, [the bill] would not prevent competitive bidding on governmental purchases below trade price levels." 656 F.2d at 100. The district court also cited the

opinion of Representative Patman, the Act's co-sponsor, as well as treatises and opinions of the federal and state attorneys general. Finally, Judge Pointer found that "[e]very judicial decision on the question has held the Robinson-Patman Act inapplicable to governmental purchases" and that reviewing appellate courts have never disapproved such rulings. 656 F.2d at 101. Against the background of accord that governmental purchases were beyond the scope of the Robinson-Patman Act, the court concluded that Congress had confirmed its intention by declining to enact a number of proposed amendments to extend the statute's coverage to purchases by governmental agencies. 656 F.2d at 101.

The court then turned to the significance of the Nonprofit Institutions Act which in 1938 provided an exemption from the Robinson-Patman Act for certain purchases by schools, public libraries, churches, hospitals and charitable institutions. 15 U.S.C. § 13c (1976). The court described the coverage of that Act as "key" since it reflects on the intention underlying the original Robinson-Patman Act enacted two years earlier. In deciding that the 1938 Act did not include governmental entities, Judge Pointer relied on the House and Senate Reports which describe the bill as "one for the exemption of 'eleemosynary institutions', a term commonly understood as referring to charitable bodies supported by private gifts, rather than taxes." 656 F.2d at 102.

Judge Pointer harmonized the 1936 and 1938 Acts with the following reasoning: First, if the 1938 Act included purchases for government hospitals, libraries and schools—the only three institutions named in the bill that possibly could be governmental as well as non-governmental nonprofit—then purchases for those types of agencies would be treated more favorably than purchases for other traditional government agencies such as police, fire, prisons, streets, poorhouses, etc., which are not listed in the 1938 Act. Since such a distinction would be irrational, the court reasoned the 1938 Act should not be construed to cover government hospitals, libraries or schools. 656 F.2d at 102.

Moreover, since the 1938 Act did not exempt any governmental entities, Congress could not have intended to cover them in the original Robinson-Patman Act. Otherwise, as Judge Pointer explained, "Congress would have intended to treat eleemosynary institutions more favorably than similar facilities operated by governmental bodies," which is "hardly likely." 656 F.2d at 102. The court then concluded:

> "The only rational answer is that, when it passed in 1938 the exemption for certain purchases by non-profit institutions, Congress did so in the belief—as stated by Representative Patman in his text of the same year—that governmental purchases were already beyond the scope of the Act." 656 F.2d at 102.

Thus based on legislative history, judicial and administrative interpretation, and logical analysis, the district court concluded that "governmental purchases are, without regard to 15 U.S.C. § 13c, beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." 656 F.2d at 102.[6]

The United States Court of Appeals for the Fifth Circuit affirmed, *per curiam*, "on the basis of the district court's Memorandum of Opinion." 656 F.2d at 93. Judge Clark filed a dissenting opinion (656 F.2d at 93). Petitioner then petitioned this Court for a writ of certiorari, which was granted on March 8, 1982.

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6 The district court assumed that petitioner had standing to assert its members' claims by virtue of its alleged status as assignee of those claims, stating that there was no reason to rule that the assignments are ineffective. 656 F.2d at 98. While the defendants still challenge plaintiff's standing to bring this action, that issue was not before the Court of Appeals and is not before this Court.

SUMMARY OF ARGUMENT

1. The legislative history of the Robinson-Patman Act reveals that it was not intended to cover sales to governmental purchasers. Prior to the statute's enactment, Congress sought and obtained assurance in a written report by the author of the bill that the proposed legislation would not affect governmental purchases or practices by which federal, state and municipal agencies obtained prices below trade levels. The co-sponsor of the Act, Representative Patman, affirmed, in 1938, that sales to municipal and other governmental purchasers are not covered. Representative Patman also proposed amendments, which Congress did not enact, to extend the Act's coverage to purchases by "the United States, any state or any political subdivision thereof." Forty-six years of consistent case law, administrative interpretation and authoritative commentary further confirm that sales to the government are not covered by the Act. In 1967-68, the House Small Business Committee held hearings in which it was apprised of the lack of coverage of government purchases and differences in prices charged to government hospitals and private purchasers but enacted no legislation to alter that result. Against this background, Congress' failure to enact proposed amendments extending the Act's coverage is compelling evidence that the Act was never intended to reach sales to governmental buyers. Any change to the contrary should be made by Congress.

2. The Nonprofit Institutions Act of 1938, which provides for exemption of certain purchases by schools, public libraries, churches and charitable institutions, does not apply to governmental purchases. The House and Senate Reports specifically refer to this Act as applying to eleemosynary institutions, which are commonly understood to mean private charitable entities. Moreover, it would not be sensible to assume that Congress included in the 1938 Act government schools, libraries or hospitals—the only three entities mentioned that might be governmental—and thus treated these types of bodies more favorably than numerous other governmental agencies not named in the Act. Since the Nonprofit Institutions Act does not exempt government purchases, application of the

Robinson-Patman Act to such purchases would place the government in a less favorable position than eleemosynary institutions. Accordingly, the only rational interpretation is that Congress did not include government agencies in the 1938 Act because they were not covered by the Robinson-Patman Act in the first place.

3. In view of the Robinson-Patman Act's legislative history, case law, administrative interpretation and statutory scheme, the reliance by petitioner and the amici on cases involving other statutes is beside the point.

ARGUMENT

I.

THE ROBINSON-PATMAN ACT DOES NOT COVER SALES TO GOVERNMENTAL PURCHASERS

The Congress which enacted the Robinson-Patman Act did not intend to prohibit the grant of lower prices to federal, state and municipal governmental purchasers. To the contrary, the legislative history reveals that Congress was expressly concerned with preserving the ability of governmental agencies to purchase at the lowest prices and to maintain their purchasing practices. As we demonstrate below, this legislative history, the record in Congress following enactment, the uniform course of judicial and administrative statutory interpretation and the only rational view of the statutory scheme all support the rulings of the courts below.

A. The Legislative History of the Robinson-Patman Act Demonstrates that the Statute Was Not Intended to Cover Sales to Governmental Purchasers.

This Court has previously considered the question of "how far Congress intended to extend its mandate under" the Robinson-Patman Act and found the answer in the "purposes and legislative history" of the Act. *Gulf Oil Corp. v. Copp Paving*

Co., 419 U.S. 186, 197 (1974). In holding that the statute does not extend to sales made locally for use in interstate facilities, the Court relied substantially on legislative history and the fact that "the courts in nearly four decades of litigation, have interpreted the statute" not to cover such sales. *Id.* at 200.

Here, as in *Gulf Oil,* the legislative history of the Robinson-Patman Act establishes Congress' intention. Congress sought and obtained from the Act's proponents assurance that the legislation would not affect bidding for governmental purchases. By the same token, as in *Gulf Oil,* forty-six years of case law, commentary and administrative interpretation confirm that the Robinson-Patman Act does not reach such purchases; and in the face of this uniform authority, Congress did not merely fail to act as was the case in *Gulf Oil,* but did not enact six proposed amendments to cover such sales.[7]

Petitioner urges that it is inappropriate to consider legislative history if the language of a statute is "plain and unambiguous."[8] This "rule" was authoritatively rejected in *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 9-11 (1976), where the Court reversed a Tenth Circuit decision relying on the same antiquated cases that petitioner now cites. The Court has held time and again that legislative history should be considered even though the language of a statute appears to be clear. *E.g., Watt v. Alaska,* 451 U.S. 259, 266 (1981); *Cass v. United States,* 417 U.S. 72, 75-79 (1974).

As Justice Stone observed in delineating the Sherman Act's coverage of labor union activities, "it is appropriate that courts should interpret [the Act's] word[s] in light of its legislative history and of the particular evils at which the

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7 At the outset, it is important to remove from controversy two irrelevant issues raised by petitioner and the amici. First, we do not here rely on the state action doctrine of Parker v. Brown, 317 U.S. 341 (1943), which is based on principles of federalism. Nor does this case involve an abstract definition of the word "person," which the Court has held for purposes of the Sherman Act includes states and cities. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 394-95 (1978). We deal with these inapposite arguments in Point III, *infra.*

8 Brief of petitioner Jefferson County Pharmaceutical Association, Inc. filed April 22, 1982 at 7-8 (hereinafter referred to as "Pet. Br. __").

legislation was aimed." *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 489 (1940). Significantly, the Court has looked to the legislative history of the Robinson-Patman Act as a guide to interpreting the text. *See, e.g., FTC v. Simplicity Pattern Co.,* 360 U.S. 55, 64, 69-70 (1959); *Automatic Canteen Co. of America v. FTC,* 346 U.S. 61, 72, 78 (1953).

1. The legislative purpose underlying the Robinson-Patman Act does not encompass a prohibition of lower prices to governmental purchasers.

The history of the Robinson-Patman Act does not evidence any congressional concern with purported adverse effects of lower prices charged to governmental agencies. Rather, Congress' singular purpose in enacting the statute was to curb the purchasing power of chain stores.[9]

The original bill was drafted by H.B. Teegarden, counsel for the United States Wholesale Grocers Association.[10] The bill

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9 *See generally* 1 ABA Antitrust Section, *The Robinson-Patman Act: Policy and Law,* 5-19 (ABA Monograph No. 4, 1980) [hereinafter cited as *ABA Monograph*]; C. Edwards, *The Price Discrimination Law* 21-53 (1959); J. Palamountain, *The Politics of Distribution* 188-233 (1968); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 3-23 (1962 & Supp. 1964); U.S. Department of Justice, *Report on the Robinson-Patman Act* 101-24 (1977) [hereinafter cited as *Department of Justice Report*]; Rowe, *The Evolution of the Robinson-Patman Act: A Twenty Year Perspective,* 57 Colum. L. Rev. 1059, 1061-74 (1957).

10 At the initial hearings on the bill, under a heading entitled "Teegarden Wrote Bill", Rep. Patman referred certain questions by other representatives to Mr. Teegarden, stating: "Mr. Teegarden wrote this bill." *To Amend the Clayton Act: Hearings Before the Committee on the Judiciary of the House of Representatives on H.R. 8442, H.R. 4995, H.R. 5062,* 74th Cong., 1st Sess. 9 (1935) [hereinafter cited as *1935 Hearings*]. The commentators on the Robinson-Patman Act have similarly recognized that Teegarden was the draftsman of the Patman bill. *See, e.g.,* J. Palamountain, *The Politics of Distribution* 197 & n.18 (1968); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 11 (1962 & Supp. 1964).

The United States Wholesale Grocers Association, for which Teegarden was general counsel, has been characterized as a "super-lobby" of "mass distributing" organizations. *ABA Monograph* 14 n.56.

was modeled on the Codes of Fair Competition authorized by the National Industrial Recovery Act of 1933 and has been characterized as reflecting the "compulsion to regulate rather than allow competition," which was a popular sentiment at the time. *Department of Justice Report* 101.

Representative Patman introduced the bill, denoting it as a measure that would finally deal with the chain-store problem. 79 Cong. Rec. 9077 (1935). In their reports, the Senate and House both described the bill as developing out of the report of the Federal Trade Commission on its chain-store investigation.[11] S. Rep. No. 1502, 74th Cong., 2d Sess. 2 (1936); H.R. Rep. No. 2287, Pt. 1, 74th Cong., 2d Sess. 3 (1936). By the time of the hearings on the bill, "[a]nti-chain [store] sentiment became virulent." *Department of Justice Report* 104. As a leading commentator has stated, the measure was "engrafted onto the Clayton Act" because "the sponsors of the bill obviously believed that legislation addressed solely to the grocery trade was constitutionally vulnerable as bald class legislation."[12] Thus, the Robinson-Patman Act was essentially special interest legislation directed towards "protection of specific firms," rather than "enhancing competition." *Department of Justice Report* 120.

Unlike the Sherman Act, which is essential to "the preservation of economic freedom and our free enterprise system,"[13] the Robinson-Patman Act "undercuts the basic goals of the antitrust laws" and is essentially anticompetitive. *Department of Justice Report* 49-50. In *United States v. United States Gypsum Co.*, 438 U.S. 422, 450, 458-59 (1978), the Court acknowledged "the potential tension between the rationales underlying the Sherman and Robinson-Patman Acts." Simi-

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11 Federal Trade Commission, *Final Report of the Federal Trade Commission Report on the Chain-Store Investigation*, S. Doc. No. 4, 74th Cong., 1st Sess. (1935).

12 Rowe, *The Evolution of the Robinson-Patman Act: A Twenty Year Perspective*, 57 Colum. L. Rev. 1059, 1074 (1957).

13 United States v. Topco Associates, 405 U.S. 596, 610 (1972).

larly, in *Great Atlantic & Pacific Tea Co. v. FTC,* 440 U.S. 69, 80-81 (1979), the Court construed the Robinson-Patman Act to avoid the imposition of liability under circumstances that would lead to " 'price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.' " The Court has also acknowledged that the Robinson-Patman Act "may be characterized as an exception to, or a qualification of, the more basic national policy favoring free competition" and that "many have argued that the Robinson-Patman Act is fundamentally anti-competitive and undermines the purposes of the Sherman Act". *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 133-34 & n.26 (1978).[14]

Consequently, the statute's scope should not be expanded beyond the plain mandates of its language and legislative history, to which we now turn.

2. During the hearings, Congress sought and obtained assurance that federal, state and municipal purchases would not be covered.

In the course of the hearings on the initial version of the bill authored by Mr. Teegarden, members of the House Committee on the Judiciary expressed concern that the proposed legislation might prevent competitive bidding and the grant of discounts to federal, state and municipal governmental purchasers. In a written report responding to the Committee's

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14 The Act has come under fire by commentators as well as enforcement agencies. *E.g.,* R. Bork, *The Antitrust Paradox* 394 (1978); R. Posner and F. Easterbrook, *Antitrust* 988 (2d ed. 1981); L. Sullivan, *Handbook of the Law of Antitrust* 681-82 (1977); Elman, *The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal,* 42 Wash. L. Rev. 1 (1966); Levi, *The Robinson-Patman Act—Is it in the Public Interest?,* 1 Antitrust L.J. 60, 60-73 (1952). Enforcement authorities have concluded that the Act is "a deplorable piece of legislation" and often detrimental to competition. W. Baxter (Assistant Attorney General), Remarks to the 20th Annual Corporate Counsel Institute, Antitrust & Trade Reg. Rep. (BNA) No. 1036, at A-3 (Oct. 22, 1981); *Interview with James C. Miller, III* (Chairman, Federal Trade Commission), 51 Antitrust L.J. 3, 7-8 (1982).

questions in this regard, Mr. Teegarden assured Congress that the bill would not have any effect on purchases by governmental entities.[15] The Teegarden report, published in the 1935 Hearings before the House Committee at 244-61, contains the following question and answer:

> "2. Would the bill prevent competitive bidding on Government purchases below trade price levels?
>
> "This question was raised by a member of the committee at the hearing. The answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives, or privileges of the sovereign unless it so expressly provides—a principle inherited by American jurisprudence from the common law (*Dollar Savings Bank v. United States* (1874), 19 Wall. 227; 22 L. ed. 80; *United States v. Herron* (1874), 19 Wall. 251; 22 L. ed. 275; *Magdalen College case,* 11 Coke 74; *King v. Allen,* 15 East 333; Maxwell on Interpretation of Statutes, 6th Ed. (Eng.), p. 244-251).
>
> "The further insertion of the clause proposed under topic 4 below, requiring a showing of effect upon competition, will further preclude any possibility of the bill affecting the Government." *1935 Hearings* at 250.

Mr. Teegarden thus informed Congress that as a matter of statutory construction, it was not necessary for the bill to exclude governmental purchases explicitly and that silence on the point would accomplish the desired result. Moreover, the question "raised by a member of the committee at the

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15 It is important to reiterate that Mr. Teegarden was the bill's principal author. *See supra* note 10. The Court has previously relied on his statements in interpreting the Robinson-Patman Act. In FTC v. Borden Co., 383 U.S. 637, 641-42 n.4 (1966), the Court looked to a written submission by Mr. Teegarden, whom it described as having "apparently played a large part in drafting the bill," as support in construing Congress' intent not to include brand likeness in the statute's like grade and quality requirement. *See also* FTC v. Fred Meyer, Inc., 390 U.S. 341, 351 n.17 (1968) (citing as authority Mr. Teegarden's explanation as the "draftsman").

hearing," to which the Teegarden report was addressed, expressly referred to governmental purchasers as including states and municipalities. The portion of the hearing referred to contained the following exchange:

> "Mr. Hancock: It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?
>
> Mr. Teegarden: You mean competitive bidding on government orders?
>
> Mr. Hancock: Government, State, city, municipality.
>
> Mr. Teegarden: No; I think not.
>
> Mr. Michener: If it did do it, you would not want it, would you?
>
> Mr. Teegarden: No; I would not want it."[16]

Thus, Mr. Teegarden assured the Committee that the bill would not eliminate competitive bidding in state or city purchases, and that he would not support the bill if it did so. And in his written submission referring to the earlier questions at the hearing, Teegarden cited a principle of statutory construction to support his proposition that competitive bidding on all governmental purchases below trade price levels would not be affected by the bill.

Amicus National Association of Retail Druggists ("NARD") contends that the above principle of statutory construction has no bearing on the applicability of a federal statute to a state government. (Amicus Curiae Brief of NARD filed with this Court on April 22, 1982 at 10 [hereinafter "NARD Br. __"]). That is not so; the principle has been utilized to construe federal statutes as not applying to states.[17]

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16 *1935 Hearings* at 209.

17 *See, e.g.*, Coan v. State, 11 Cal. 3d 286, 520 P.2d 1003, 113 Cal. Rptr. 187 (1974); State *ex rel.* Ervin v. Gilligan, 35 Ohio App. 2d 84, 300 N.E.2d 225 (1973). In each of these cases, a federal statute was held not to

But more significantly, Mr. Teegarden cited the principle in order to respond to a question concerning competitive bidding by states and municipalities, as well as the federal government, and whether he was technically right (as he was) is less important than the plain intent that emerges from Congress' questions and his written assurance. Whether Mr. Teegarden's citations strictly supported his conclusion is beside the point. The fact is inescapable that, as the draftsman of the Act, he took pains to allay Congress' concern that purchasing by states and municipalities might be adversely affected by the price discrimination bill. "[T]he relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown v. General Services Administration,* 425 U.S. 820, 828 (1976). *See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 50 U.S.L.W. 4457, 4464 n.61 (U.S. May 3, 1982).[18]

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include the state within its coverage relying upon the rule of construction cited by Teegarden. In addition, in the following cases a state statute was held not to cover a political subdivision such as a county or town: In re Miller's Estate, 5 Cal. 2d 588, 597, 55 P.2d 491, 495 (1936); Town of New Roads v. Dukes, 312 So. 2d 890 (La. Ct. App. 1975).

18 While the issue is what Congress understood and Mr. Teegarden intended to convey in 1935, the fact is that the principle of statutory construction relied on by Mr. Teegarden has retained its vitality. *See, e.g.,* Hancock v. Train, 426 U.S. 167 (1976); FPC v. Tuscarora Indian Nation, 362 U.S. 99 (1960); United States v. United Mine Workers, 330 U.S. 258 (1947).

As for NARD's contention (NARD Br. 10 n.18) that the principle, if applied to states, would be inconsistent with Georgia v. Evans, 316 U.S. 159, 161 (1942), the Court there simply indicated, quoting United States v. Cooper Corp., 312 U.S. 600 (1941), that

> " 'there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law.' 312 U.S. at 604-605."

Applying that caveat to the Robinson-Patman Act leads to the conclusion that Congress did not intend to cover state or other governmental purchases.

The second paragraph of the Teegarden written response confirms the point. In stating that the insertion in the amended bill of language requiring a showing of an effect upon competition "will *further* preclude any possibility of the bill affecting the government" (emphasis supplied), the statutory draftsman emphasized that the presence or absence of competition between a governmental purchaser and a disfavored buyer was not critical, and that in either event governmental purchasers were not covered. Thus, Mr. Teegarden assured Congress unqualifiedly in the first paragraph of his answer that the bill would not cover government purchases since it did not expressly so provide; and in the second paragraph he stated that the typical absence of government competition would provide a "further" reason to allay any possible concern.

Petitioner and NARD rely on certain questions and answers taken out of context from the House Judiciary Committee hearings that preceded Teegarden's written submission. (Pet. Br. 11-12; NARD Br. 8-9.) Teegarden's responses at the hearings as a whole are not inconsistent with his written response; but in any event, his written report—reflecting the draftsman's careful and considered view—prevails, just as a committee report takes precedence over isolated remarks in debate which may not have been thought through. *E.g.*, *Zuber v. Allen*, 396 U.S. 168, 186 (1969).[19] Even more importantly, the hearings as a whole reveal Congress' consistent desire for assurance that competitive bidding and discount prices for governmental agencies not be affected.[20]

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19 The written report expressly states that it reflects "further study given to the questions therein raised." *1935 Hearings* at 245.

20 In his desire to provide that assurance, Teegarden at one point said that competitive bidding would not be eliminated for non-governmental sales, as well as governmental sales. This obviously went too far as the Robinson-Patman Act at the very least created uncertainty as to competitive bidding practices. *See 1935 Hearings* at 209; note 36 *infra*. In his written report, having reflected on the matter, he limited his assurance to competitive bidding on *governmental* purchases which he said would not possibly be affected.

There is one portion of Teegarden's testimony (quoted by NARD at Br. 9) which may be interpreted to suggest that the bill covers government hospitals that compete and excludes those that do not. *1935 Hearings* at 209. There is no foundation in the language of the Patman Bill as then proposed or the Robinson-Patman Act as enacted for any such distinction; under each version of the statutory language, the law could be violated by price discriminations between non-competing purchasers.[21] In any event, this distinction was abandoned in the written submission, in which Mr. Teegarden based his conclusion on a principle of statutory construction. The theme that clearly emerges from Mr. Teegarden's oral replies is that he was constantly trying to reassure the Committee members that the Act would not adversely affect government purchases at low prices.[22]

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21 The early version of the bill then under consideration did not contain a clause requiring a showing of likely effect on competition. Rather, it prohibited discrimination "between different purchasers" without regard to effect on competition. *1935 Hearings* at 1. Thus, the version of the bill to which Teegarden's oral comment was addressed unconditionally banned discrimination in price, and it was not until later that the Senate added the requirement that probable competitive injury be established. S. Rep. No. 1502, 74th Cong., 2d Sess. 1 (1936). *See ABA Monograph* 16; Rowe, *The Evolution of the Robinson-Patman Act: A Twenty Year Perspective*, 57 Colum. L. Rev. 1059, 1069 (1957).

Moreover, even in the Robinson-Patman Act as enacted, a violation may occur where the purchasers do not compete but the discrimination "injure[s] . . . competition with any person who . . . grants . . . such discrimination." Thus, a violation in the "primary line" which injures competition between the discriminating seller and others in the seller's market can exist even though the purchaser receiving the discrimination does not compete with the disfavored purchaser. *See, e.g.*, Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

22 Teegarden also stated in response to a question that the federal government's purchases are covered only if they would have been within the original Clayton Act. Attorney General Cummings in his 1936 opinion on the

Taken as a whole, this legislative history demonstrates that Congress sought assurance that purchases by states and their political subdivisions would not be covered by the Act. The draftsman of the bill, who played a significant role in its passage, assured Congress in writing that there was no possibility that purchasing by any governmental agency would be affected.

B. Congress Has Confirmed Its Intent Not to Extend the Coverage of the Robinson-Patman Act to Government Purchases.

1. Post-enactment legislative history is persuasive of congressional intent.

It is a well-established principle of statutory construction that post-enactment action or inaction by Congress in the face of longstanding judicial or administrative construction of the statute in question provides compelling evidence of legislative intent. As the Court explained in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488-89 (1940), relevant considerations in assessing the scope of the Sherman Act include the "long time failure of Congress to alter the Act after it had been judicially construed"; and that factor is strengthened "where after the matter has been fully brought to the attention of the public and the Congress, the latter has not seen fit to change the statute." *Accord Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199-201 (1974) (congressional inaction in light of consistent judicial interpretation of Robinson-Patman Act); *Blau v. Lehman*, 368 U.S. 403, 413 (1962) ("Congress is the proper agency to change an interpretation of the [Securities] Act unbroken since its passage, if the change is to be made"). *See*

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scope of the recently enacted Robinson-Patman Act stated that insofar as he was aware, the 1914 Act "has not been regarded heretofore as applicable to Government contracts." Opinion of the Attorney General of the United States, 38 Op. Att'y Gen. 539, 1932-39 Trade Cas. (CCH) ¶ 55,145 (Dec. 28, 1936) (discussed *infra* at pp. 22-23).

also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 50 U.S.L.W. 4457 (U.S. May 3, 1982).

This principle applies with equal force to consistent administrative agency policy. Thus, in *FTC v. Bunte Bros.*, 312 U.S. 349, 351-52 (1941), the Court rejected a proposed interpretation of the Clayton Act because, among other reasons, the Federal Trade Commission had never asserted such a claim despite twenty-five years of administrative enforcement of the statute and Congress did not see fit to amend it. *Accord CBS, Inc. v. FCC*, 453 U.S. 367, 101 S.Ct. 2813, 2823 (1981) ("deference 'is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives' "); *Zemel v. Rusk*, 381 U.S. 1, 11 (1965) (administrative interpretation plus congressional failure to revise is "persuasive evidence" of congressional intent);[23] *Power Reactor Development Co. v. International Union of Electrical Workers*, 367 U.S. 396, 408-09 (1961) (congressional inaction is "*de facto* acquiescence in and ratification of" practical administrative construction where brought to attention of congressional committee).

These considerations are all the more persuasive where efforts are made in Congress to change the law as applied by judicial and administrative authorities and Congress declines to do so. As the Court explained in *FTC v. Ruberoid Co.*, 343 U.S. 470, 478-79 (1952), where Congress had failed to enact bills which would have changed the Clayton Act in a manner consistent with that urged on the Court by the FTC:

> "We will not achieve the same result by reinterpretation in the face of Congress' failure to pass the bills thus brought before it."

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23 *See* Haig v. Agee, 453 U.S. 280, 300 (1981) ("*Zemel* recognized that congressional acquiescence may sometimes be found from nothing more than silence in the face of administrative policy.").

Accord Flood v. Kuhn, 407 U.S. 258, 283 (1972) ("Remedial legislation has been introduced repeatedly in Congress but none has ever been enacted" to extend Sherman Act's coverage to major league baseball); *Joint Industry Board of the Electrical Industry v. United States*, 391 U.S. 224, 228 (1968) (bills introduced but not passed to overrule case law interpreting Bankruptcy Act).

It is thus settled that inferences as to legislative intent are properly drawn from congressional inaction against a background of judicial decision and administrative interpretation, and that far stronger inferences result when Congress rejects efforts to amend the law in order to alter the course of judicial and administrative construction. That is precisely the case here.

No court in the forty-six year history of the Robinson-Patman Act has ever held it to prohibit price discrimination in sales to governmental purchasers. Every litigated claim of a discriminatory sale to a federal, state or municipal agency has been rejected. What is more, we know of no instance in which either the Department of Justice or the Federal Trade Commission—the agencies charged with enforcing the Act—has ever commenced a proceeding challenging lower prices in sales to a governmental agency. Published opinions of the Attorney General of the United States, as well as of state attorneys general, provide further evidence of administrative interpretation supporting the conclusion that governmental purchases are beyond the statutory scope[24]—a view also espoused by

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24 *See* Opinion of the Attorney General of the United States, 38 Op. Att'y Gen. 539, 1932-39 Trade Cas. (CCH) ¶ 55,145 (Dec. 28, 1936) (discussed *infra* pp. 22-23). Other administrative opinions have affirmed the 1936 opinion of the Attorney General. Report Under Executive Order 10936 on Identical Bidding in Public Procurement 11 (1962) (opinion of Attorney General Robert F. Kennedy); Letter from Comptroller General to Robert F. Sarlo, Veterans Administration (July 17, 1973), *reprinted in* 1973-2 Trade Cas. (CCH) ¶ 74,642 (1973). The Attorneys General of Minnesota and Wisconsin have rendered opinions stating that the Robinson-Patman Act does not cover purchases by their respective states or sellers submitting bids for state purchases. Opinion of the Attorney General of Minnesota, 1932-39

leading commentators.[25]

Most significantly, Congress did not pass proposed amendments to extend the Act's coverage to governmental purchases. In such circumstances—and particularly in light of the legislative history—the conclusion that the statute was not intended to reach such transactions is compelling.

2. Congress did not pass amendments proposed to cover purchases by the United States, any state and any political subdivision.

The first two amendments to extend the Robinson-Patman Act's coverage to purchases by federal, state and local governments were introduced in successive Congresses in 1951 and 1953 by Representative Patman, the sponsor of the original Act. These bills would have provided:

> "That for the purposes of this section [Section 2 of the Act] the term 'purchaser' includes the United States, any State or any political subdivision thereof." H.R. 4452, 82d Cong., 1st Sess. (1951); H.R. 3377, 83d Cong., 1st Sess. (1953).

Trade Cas. (CCH) ¶ 55,157 (March 4, 1937); Opinion of the Attorney General of Wisconsin, 26 Op. Att'y Gen. Wis. 142 (April 13, 1937).

The Opinions of the Attorneys General of California, 1932-39 Trade Cas. (CCH) ¶ 55,156 (Feb. 26, 1937), and Georgia, 1948-49 Trade Cas. (CCH) ¶ 62,455 (June 14, 1949), are inapposite. The California opinion erroneously relies on IBM Corp. v. United States, 298 U.S. 131 (1936), which is beside the point because it involved a tying arrangement challenged under Section 3 of the Clayton Act, 15 U.S.C. § 14. The issue of the intended reach of the Robinson-Patman Act was not before the Court. The Georgia opinion addressed sales—not purchases—by a state-owned factory, an issue of statutory coverage different from that presented here.

25 *See* 5A Z. Cavitch, *Business Organizations* § 105D.01[8] [b,c] (1982); E. Kintner, *A Robinson-Patman Primer* 202-03 (1970); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 83-85 (1962 & Supp. 1964); 16C J. von Kalinowski, *Business Organizations: Antitrust Laws and Trade Regulation* § 24.06 (1981).

Representative Patman, in his book, *The Robinson-Patman Act,* published in 1938 (two years after the Act was passed),[26] had previously stated that the Act did not apply to federal or municipal government purchases:

> "Question. If a manufacturer sells to government, municipal, or public institutions at a lower price than he sells to his wholesale customers, is he in violation of the law if he does not make the same price for the same quantity available to the wholesaler to whom he sells?
>
> *Opinion.* The Attorney General of the United States has ruled that the Act does not apply to the government. (See Chapter 18.) It may be presumed that the Attorney General's reasons may be also applied to municipal and public institutions." *Id.* at 168.

Chapter 18, referred to in the answer, is entitled "Application of the Act to Government Bids." Representative Patman refers to the fact that:

> "Numerous inquiries have been received as to the application of the Robinson-Patman Act to government bids, when the differential between the price sought to be offered to the government and the price to other buyers cannot be justified by any demonstrable difference in cost of manufacture, sale, or delivery." *Id.* at 205.

The book then quotes the December 1936 opinion of the Attorney General of the United States " 'concerning the application of the Robinson-Patman Act . . . to government contracts for supplies.' "[27] *Id.* at 205. In his opinion, Attorney

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26 Representative Patman's book has been cited as an authoritative source of interpretation of the Robinson-Patman Act, FTC v. Borden Co., 383 U.S. 637, 640 (1966); FTC v. Henry Broch & Co., 363 U.S. 166, 175 (1960), and it has been equated with legislative history in construing congressional intent. *See* Canadian Ingersoll-Rand Co. v. D. Loveman & Sons, Inc., 227 F. Supp. 829, 833 (N.D. Ohio 1964).

27 *See* Opinion of the Attorney General of the United States, 38 Op. Att'y Gen. 539, 1932-39 Trade Cas. (CCH) ¶ 55,145 (Dec. 28, 1936).

General Cummings referred to the principle of statutory construction relied on in Mr. Teegarden's report to the House Judiciary Committee and stated that " 'it does not seem to have been the policy of the Congress to make such statutes applicable to the Government.' " *Id.* at 206. The Attorney General also relied on the practice which had developed under the 1914 Clayton Act's anti-discrimination provisions of granting special prices to government agencies for a variety of reasons including absence of credit risk or solicitation expenses. He expressly refrained from grounding his opinion on the argument that low prices to governmental purchasers would seldom violate the Act because of the absence of likely competitive injury, and instead relied on that circumstance as " 'another reason for avoiding a construction that would make the statute applicable to the Government.' " *Id.* at 207.

As Representative Patman concluded, these reasons are equally applicable to contracts for supplies to municipal and other state agencies which have developed and followed competitive bidding practices over the years based on their understanding of the statute's scope.[28]

Both the Eighty-Second and Eighty-Third Congresses failed to enact the Patman proposals to extend the Act to cover purchases by states and political subdivisions. Thereafter, proposed amendments were introduced in four successive Congresses from 1955 to 1961. Although they would have applied the Act only to purchases by agencies of the United States, these proposals are significant because they specifically would have applied the Act to governmental "purchases . . . for resale"—thus demonstrating that such purchases by the federal government were not within the provisions of the 1936 Act. Each of these amendments was rejected by Congress.[29]

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28 In Representative Patman's 1963 *Complete Guide to the Robinson-Patman Act,* an update of his 1938 book, he reiterates that the Robinson-Patman Act does not apply to discounts by a seller to "government, municipal, or public institutions." *Id.* at 30.

29 H.R. 430, 87th Cong., 1st Sess. (1961); H.R. 155, 86th Cong., 1st Sess. (1959); H.R. 722, 85th Cong., 1st Sess. (1957); H.R. 5213, 84th Cong.,

In short, from 1951 through 1961, Congress failed to enact bills to amend the statute to prohibit price discrimination in favor of governmental purchasers—strong and persuasive evidence that the Act does not reach such purchases.

Congress never resurrected these amendments despite the active consideration by a House subcommittee, in 1967 and 1968, of problems faced by small businessmen in the drug industry, including the issue of discounts given to governmental purchasers. *See Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives*, 90th Cong., 1st Sess. (1967-68).

Significantly, the Subcommittee Report incorporated the testimony on behalf of NARD, an amicus here, of Earl W. Kintner, former chairman of the Federal Trade Commission, who made it clear that sales of drugs to government agencies were beyond the scope of the Robinson-Patman Act, without regard to the Nonprofit Institutions Act of 1938 which he said applied only to "private nonprofit institutions."[30] Thus, Kintner classified institutional sales and their coverage under the Robinson-Patman Act into three distinct categories. First, he noted that a drug supplier sells drugs to federal, state and municipal government institutions "without regard to the Robinson-Patman Act, because such sales are probably exempt from the Robinson-Patman Act." His second category was sales to "private nonprofit institutions" which "[t]he Non-

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1st Sess. (1955). The bills each provide that: "For the purposes of this subsection [2(a)], when any officer or agency of the United States (including those operating on nonappropriated funds) purchases commodities for resale, such officer or agency shall be deemed to be a purchaser of commodities to which this subsection refers, and such purchases shall be deemed to be in commerce."

30 Contrary to Mr. Kintner's testimony on its behalf, NARD now contends that the Robinson-Patman Act and the Nonprofit Institutions Act cover sales to government institutions. (NARD Br. 11-14.) In his book, Mr. Kintner concludes that the Robinson-Patman Act does not cover sales to federal, state or local governments. E. Kintner, *A Robinson-Patman Primer* 203 (1970).

profit Institutions Act of 1938 exempts . . . when such products are for the institution's 'own use.' " Kintner's third category consisted of sales to private institutions operated for profit which are "not under the exemption of the Nonprofit Institutions Act," and to which "the Robinson-Patman Act applies."[31]

In its conclusions, the Subcommittee Report noted "[t]he difference between drug prices charged retailers and wholesalers as compared to those charged institutional and governmental customers." H.R. Rep. No. 19, 90th Cong., 2d Sess. 77 (1968). But, following the analysis presented by Kintner, the report singled out "[n]ongovernmental health care institutions, notably profit and nonprofit hospitals" for their competition with retail druggists. *Id.* at 78. The Report then noted that "[t]he Nonprofit Institutions Act of 1938 is designed to afford immunity to private nonprofit institutions (like hospitals so organized), from the prohibitions of the Robinson-Patman Act to the extent the sales are for the nonprofit institution's 'own use'. " *Id.* And from this, the Subcommittee concluded that "the mandate of the Robinson-Patman Act should . . . be applied to discriminatory drug sales favoring nongovernmental institutional purchasers, profit or nonprofit . . . ." *Id.* at 79.

The record of the 1967-68 hearings[32] leads to an incontrovertible conclusion: Congress accepted the then-settled distinction

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31 H.R. Rep. No. 19, 90th Cong., 2d Sess. 7-8 (1968).

It is noteworthy that NARD explicitly refrained from seeking legislation to extend the Robinson-Patman Act's coverage to governmental purchases. Thus, after telling Congress that neither the Robinson-Patman Act nor the Nonprofit Institutions Act applied to such purchases, Mr. Kintner expressed NARD's belief that "existing legislation is otherwise adequate to cope with the substantive problem of discriminatory institutional pricing by drug suppliers." *Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives,* 90th Cong., 1st Sess. 19 (1967-68). The only amendment suggested was "enlarging the commerce sweep of the Robinson-Patman Act to transactions 'affecting commerce'." *Id.*

32 In 1969, another subcommittee of the House Small Business Committee, which held hearings and issued a report concerning the Robinson-Patman Act, was similarly apprised that the statute does not cover sales to

between government and non-governmental non-profit hospitals and recognized the fact that the Robinson-Patman Act covers only the latter. The Subcommittee made no recommendation that the statute be made applicable to governmental purchases. Nor did Congress pass legislation to broaden the scope of the Act to include sales to governmental entities after the Report was issued. Such congressional inaction when a particular construction and related arguments as to its consequences are brought to the attention of one of its committees constitutes "*de facto* acquiescence in and ratification of" that construction. *Power Reactor Development Co. v. International Union of Electrical Workers,* 367 U.S. 396, 408-09 (1961).

3. Congress failed to amend the Act after decades of well-recognized judicial construction that the statute does not apply to governmental purchases.

In the forty-six years since the passage of the Robinson-Patman Act, no claim charging discriminatorily low prices to a governmental purchaser in violation of Section 2(a) and no claim for inducing such prices under Section 2(f) has ever succeeded. Rather, the judicial decisions have held or stated that the Robinson-Patman Act is not intended to cover government purchases. *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.,* 632 F.2d 680 (7th Cir. 1980), *aff'g,* 479 F. Supp. 281 (C.D. Ill. 1979); *Pacific Engineering & Production Co. v. Kerr-McKee Corp.,* 1974-1 Trade Cas. (CCH) ¶ 75,054 (D. Utah 1974), *aff'd in part and rev'd in*

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governmental purchasers. *See* Statements of William C. McCamant, Director of Public Affairs, National Association of Wholesalers (the Robinson-Patman Act has not been extended to cover sales to the federal, state and local governments) and Harold T. Halfpenny, counsel to Automotive Service Industry Association (asking Congress to consider amending the Act in view of "legislative history and subsequent interpretation . . . that sales made to federal or state governmental bodies are not subject to the provisions of the Act"). *Small Business and the Robinson-Patman Act: Hearings Before the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives,* 91st Cong., 1st Sess. 73, 623 (1969).

part, 551 F.2d 790 (10th Cir.), *cert. denied,* 434 U.S. 879 (1977) (inapplicability to government recognized as a matter of law but not applicable to case in which sale was to private party with government the ultimate consumer); *Portland Retail Druggists Ass'n v. Abbott Laboratories,* No. 71-543 (D. Or. Sept. 11, 1972) (unpublished spoken opinion), *vacated and remanded on other issues,* 510 F.2d 486 (9th Cir. 1974), *vacated and remanded on other issues,* 425 U.S. 1 (1976); *Logan Lanes, Inc. v. Brunswick Corp.,* No. 4-66-5 (D. Idaho May 26, 1966) (unpublished opinion), *aff'd on other grounds,* 378 F.2d 212 (9th Cir.), *cert. denied,* 389 U.S. 898 (1967); *Sachs v. Brown-Forman Distillers Corp.,* 134 F. Supp. 9 (S.D.N.Y. 1955), *aff'd per curiam on basis of district court opinion,* 234 F.2d 959 (2d Cir.), *cert. denied,* 352 U.S. 925 (1956); *General Shale Products Corp. v. Struck Construction Co.,* 37 F. Supp. 598 (W.D. Ky. 1941), *aff'd on other grounds,* 132 F.2d 425 (6th Cir. 1942), *cert. denied,* 318 U.S. 780 (1943). *See Mountain View Pharmacy v. Abbott Laboratories,* No. C-77-0094 (D. Utah Sept. 6, 1977) (unpublished consent order), *aff'd,* 630 F.2d 1383 (10th Cir. 1980) (order on consent dismissing with prejudice Robinson-Patman claims based on sales to governmental agencies). *See also Sterling Nelson & Sons v. Rangen, Inc.,* 235 F. Supp. 393 (D. Idaho 1964), *aff'd,* 351 F.2d 851, 859 (9th Cir. 1965), *cert. denied,* 383 U.S. 936 (1966) (state was the "victim, not the beneficiary"); *Sperry Rand Corp. v. Nassau Research & Development Associates, Inc.,* 152 F. Supp. 91 (E.D.N.Y. 1957) (disclaiming any ruling that questioned inapplicability of Act to government).

Two of these cases were decided prior to or concurrently with Congress' consideration and rejection of the proposed amendments discussed *supra,* pp. 21-24. Thus, in *General Shale Products* the district court held as an alternative ground of decision that sales of brick to the Louisville Municipal Housing Commission "would not be within the purview of the Act because the Act does not apply to sales to the government, state or municipalities." 37 F. Supp. at 602. The court relied on the 1936 opinion of the United States Attorney General, as well as the opinions of the Attorneys General of Minnesota

and Wisconsin, and quoted the principle of statutory construction cited by Mr. Teegarden. In *Sachs*, Judge Weinfeld noted, in rejecting Robinson-Patman claims involving sales to state liquor commissions, that "[i]t is doubtful at best whether the Robinson-Patman Act applies at all to sales to Government agencies, state or federal." 134 F. Supp. at 16.

Amicus NARD contends that some of the decisions cited contain only dictum and are thus not on point. (NARD Br. 17.) That is irrelevant since these cases are not cited as binding on this Court, but as evidence of the pervasive and well recognized interpretation of the Robinson-Patman Act confronted by Congress when it considered and rejected amendments to expand the Act's definition of "purchaser" to include government agencies.[33]

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33 NARD's reliance on certain cases to demonstrate that the Robinson-Patman Act applies to governmental purchases is without foundation, and its distinction of the cases cited by the district court is also unsupported.

In *Logan Lanes*, the district court dismissed a complaint on summary judgment brought by the operator of a bowling alley against an equipment supplier for violating Section 2(a) by charging lower prices to the Utah State Building Board which installed the equipment at Utah State University. The district judge held that a sale to the State of Utah does not come within the provisions of the Robinson-Patman Act, noting that otherwise "the implications in denying such immunity shall have far reaching effect on the present day governmental purchasing procedures." No. 4-66-5, op. at 4. The Ninth Circuit, without criticizing this holding, affirmed on the alternate ground that despite the alleys' being open to the public, the Nonprofit Institutions Act also exempted the sale.

Section 2(c) cases relied on by NARD (NARD Br. 18) are inapposite. Sterling Nelson & Sons v. Rangen, Inc., 235 F. Supp. 393, 399 (D. Idaho 1964), *aff'd*, 351 F.2d 851, 858-59 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966), involved commercial bribery where "[the state] was the victim, not the beneficiary." 351 F.2d at 859. The district court in *Logan*, in holding Section 2(a) inapplicable to government purchases, distinguished *Rangen* on this ground. *Logan*, No. 4-66-5, op. at 4. The Court of Appeals in *Rangen* referred to the policy favoring allowance of the lowest price to government purchasers which gives rise to an exemption for such sales. 351 F.2d 858-59.

Burge v. Bryant Public School Dist., 520 F. Supp. 328 (E.D. Ark. 1980), *aff'd*, 658 F.2d 611 (8th Cir. 1981), was a Section 2(c) case in which dismissal was affirmed based on the "services rendered" exception in that section. As

The Seventh Circuit has recently applied parallel reasoning to affirm dismissal of a suit by a book and magazine distributor against a competitor alleging discrimination in favor of Army and Air Force post exchanges. *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 632 F.2d 680 (7th Cir. 1980), *aff'g*, 479 F. Supp. 281 (C.D. Ill. 1979). The Court of Appeals concluded, based on "strong evidence in the legislative history," that the Robinson-Patman Act was not intended to include purchases by the federal government. The Seventh Circuit relied on a number of elements which apply equally to states and municipalities, including Mr. Teegarden's statement to the House Judiciary Committee that "the bill would not prevent competitive bidding on government purchases below trade price levels," Congressman Patman's statements in his 1938 book and Congress' rejection of proposed amendments to cover governmental purchases. 632 F.2d at 688. The Court of Appeals concluded that a change in coverage should be left to Congress "[a]s we are not 'robed legislators.' " 632 F.2d at 692.[34]

NARD concedes, the Eighth Circuit affirmed, "[w]ithout reaching the issue of exemption" asserted under the Nonprofit Institutions Act. (NARD Br. 16, citing 658 F.2d at 612.)

As for *Sperry Rand Corp.* (cited at NARD Br. 18), the court, on Motion for Reargument, specifically stated:

> "If the opinion of June 6 can be construed to suggest that sales to the Government can be thought to be subject to the provisions of the Robinson-Patman Act, a full disclaimer of any such intention is hereby made." 152 F. Supp. at 96.

Finally, in A.J. Goodman & Son, Inc. v. United Lacquer Mfg. Corp., 81 F. Supp. 890 (D. Mass. 1949), the court merely assumed that sales to states *could* create Robinson-Patman liability but did not discuss or analyze the issue. The case was dismissed because plaintiff was not a purchaser and there was no injury shown.

34 The references in *Champaign-Urbana* to sovereign immunity cited by NARD (NARD Br. 16-17), were in support of dismissal of suit against the Exchange Service and the Air Force and Army Secretaries (479 F. Supp. at 283-88; 632 F.2d at 687-88); the issue of whether, in light of the legislative history, Congress intended to cover sales to the government was reached

4. Development of governmental purchasing practices against a background of forty-six years of consistent statutory interpretation supports the conclusion that only Congress should expand the Robinson-Patman Act's coverage.

For almost half a century, state and county agencies have purchased goods at low prices in the justified belief that their buying practices are beyond the scope of the price discrimination law. These practices have developed unhindered despite full and continuing congressional awareness and acquiescence—from the 1935 hearings prior to the Robinson-Patman Act's passage through the 1968 Small Business Committee's reaffirmation of the legality of discounts to governmental purchasers and to date. States and local governmental agencies have established bidding procedures—to obtain the lowest possible price—often mandated by statute, for numerous products including prescription drugs.[35]

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because the private competitor defendant who made the sales could "not find shelter behind the sovereign immunity of a buyer." 479 F. Supp. at 288.

Contrary to NARD's statement (NARD Br. 17), Exchange Service sales are not limited to military personnel but include, *inter alia*, disabled veterans, retired personnel, certain reserve members, and their dependents. Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., 632 F.2d 680, 684-85 (7th Cir. 1980), *aff'g*, 479 F. Supp. 281 (C.D. Ill. 1979). Even with these limitations, such sales would not be analogous to sales that would be considered "own use" under Abbott Laboratories v. Portland Retail Druggists Ass'n, 425 U.S. 1 (1976). The Exchange Service is a retail store (632 F.2d at 681) selling at lower prices than off-base stores where persons with exchange privileges would otherwise shop.

35 As a recent publication of the Council of State Governments states, "[m]ost state and local government purchasing laws provide that all awards for purchases setting forth a stipulated dollar amount be based on formal sealed competitive bids . . . ." The Council of State Governments, National Association of State Purchasing Officials, Law Enforcement Assistance Administration, Peat, Marwick, Mitchell & Co., *State and Local Government Purchasing* 6.2 (1975).

Alabama law mandates competitive bidding for purchases by state agencies, *see* Ala. Code §§ 41-16-20 to 41-16-21 (1975 & Supp. 1981), and by counties and county hospitals to some extent. Ala. Code §§ 41-16-50 to 41-16-51 (1975 & Supp. 1981), 22-21-190 (1975). Other states have mandatory

Application of the Robinson-Patman Act would place these purchasing practices under a cloud of doubt and might well result in higher prices for government purchases.[36] If suppliers elect not to lower general market prices to the levels charged the government, then the prevailing prices in the private sector would create a floor for government contract bidding.[37] Bid-

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competitive bidding as well. *See, e.g.*, Arkansas Purchasing Law, Ark. Stat. Ann. §§ 14-233 to 293 (1979 & Supp. 1981); Ark. Stat. Ann. § 14-611 (1979 & Supp. 1981); Ark. Stat. Ann. § 14-653 (1979 & Supp. 1981); Cal. Gov't Code § 14807 (West 1980); Colorado Procurement Code, Colo. Rev. Stat. §§ 24-101-101 to 24-112-101 (Supp. 1981) (effective Jan. 1, 1982); Fla. Stat. Ann. § 287.062 (West 1975 & Supp. 1982); Indiana State Procurement Code, Ind. Code Ann. §§ 4-13.4-1-1 to 4-13.4-9-5 (Burns 1982) (effective after Dec. 31, 1981); Kan. Stat. Ann. §§ 75-3739 to 75-3740 (1977 & Supp. 1979); Ky. Rev. Stat. Ann §§ 45A.005-45A.990 (Bobbs-Merrill 1980 & Supp. 1980); Louisiana Procurement Code, La. Rev. Stat. Ann. §§ 39:1151-39:1738 (West Supp. 1982); Me. Rev. Stat. Ann., tit. 5, § 1816 (1964 & Supp. 1981-82); Maryland Procurement Code, Md. Ann. Code art. 21, §§ 1-101 to 9-217 (1981 & Supp. 1981); Minn. Stat. Ann. § 16.07 (West 1977 & Supp. 1982); Mo. Ann. Stat. § 34.040 (Vernon 1969); N.J. Stat. Ann. § 52-34-6 (West 1955); South Carolina Consolidated Procurement Code, S.C. Code Ann. §§ 11-35-10 to 11-35-5270 (L. Coop. Supp. 1981); Utah Procurement Code, Utah Code Ann. §§ 63-56-1 to 63-56-73 (Supp. 1981); Wis. Stat. Ann. § 16.75 (West 1972 & Supp. 1981-82).

36 Commentators have often noted that the Robinson-Patman Act is incompatible with effective competitive bidding. *See, e.g., Pricing and the Robinson-Patman Act,* 41 Antitrust L.J. 147, 161 (1971) ("competitive bidding has always been very hard to rationalize under the Robinson-Patman Act, whether you look at it from the standpoint of a buyer or a seller."); Note, *Competitive Bidding under the Robinson-Patman Act,* 49 St. John's L. Rev. 512, 539-40 (1975) ("Bidding and price haggling are often viewed as an ideal manifestation of the competitive process . . . . Nevertheless, the uncertainties which the Robinson-Patman Act presents may discourage the use of these pro-competitive devices and lead to stagnation within pricing structures."). *Cf.* Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69, 80 (1979).

37 This problem is particularly acute with respect to drugs in light of the skyrocketing costs of health care. "Make no mistake about it—this skyrocketing inflation in health costs is our nation's most serious health care problem." R.S. Schweiker (Secretary, Department of Health and Human

(footnote continued on next page)

ding procedures would be less effective since prevailing non-governmental prices would likely be bid. As the Department of Justice concluded in its study of the Robinson-Patman Act, "the evidence is that the Act promotes high prices . . . ." *Department of Justice Report* 260.[38] Governmental programs have undoubtedly been implemented upon the assumption that lower costs for supplies can be lawfully secured. In such circumstances, extension of the Robinson-Patman Act to governmental purchases should, as a matter of sound public policy, be left to Congress. *See Flood v. Kuhn,* 407 U.S. 258, 278-79 (1972).

There are also strong reasons why governmental hospitals in particular should be allowed to continue their long-standing purchasing practices unencumbered by the Robinson-Patman Act. As the Court recently noted, hospitals are "an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." *National League of Cities v. Usery,* 426 U.S. 833, 855 (1976). *See also Ball v. James,* 451 U.S. 355, 366 (1981); *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60, 77 (1978) (Stevens, J., concurring). Government hospitals have been recognized as "different" from non-governmental nonprofit

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Services), Remarks before The Conference Board, New York, N.Y. (April 6, 1982).

The express policy of the National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 42 U.S.C. § 300k, *et seq.* (1976), is to effect "equal access to quality health care at a reasonable cost" as a priority of the federal government. 42 U.S.C. § 300k(a)(1)(1976).

38 Attorney General Cummings stated that one reason for excluding the government from the coverage of the Act would be "an estimated lower cost of doing business." Opinion of the Attorney General of the United States, 38 Op. Att'y Gen. 539, 1932-39 Trade Cas. (CCH) ¶ 55,145 (Dec. 28, 1936). The cost justification defense is so hard to fulfill that it would not cure this problem if governmental purchases are covered by the Robinson-Patman Act. *See* Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 67-69 (1953); *Department of Justice Report* 18-22.

hospitals because they provide total health care service to the poor,[39] which includes the procurement and dispensation of drugs.[40]

The fabric of governmental purchasing, including competitive bidding practices, should not be judicially torn apart at this late date—some forty-six years after the Robinson-Patman Act was enacted but never applied to these purchases.[41] More-

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39 Testimony of James J. Mongan, M.D., Executive Director of the Truman Medical Center before Senate Finance Committee in regard to budget cuts for governmental hospitals, *Hearings on the Administration's Budget Proposal Before the Senate Finance Committee*, 97th Cong., 2d Sess. __ (1982) (unpublished as of this date). The Truman Medical Center is a government instrumentality supported by the state, county and city with major responsibility for caring for indigent patients in the Kansas City, Missouri area. Dr. Mongan, testifying on behalf of the National Association of Public Hospitals, an organization representing most of the public hospitals in the largest cities in the United States, stated:

> "[W]e are the hospitals of last resort in our communities. This is in many ways our proudest mission—a mission in the best tradition of the healing arts—and yet this is at the same time, the root source of our special problems . . . .
>
> "We provide a broad range of expensive specialty services which serve the whole community, rich and poor alike, and which are often too costly for private hospitals to maintain . . . . In major urban areas public hospitals which represent just 1.6% of the hospitals provide almost 25% of the outpatient clinic services."

40 The county hospital named as a defendant in this action is required by state law to provide medical care and treatment of "indigent persons" and to furnish "drugs and medicine to such indigent persons, including outpatient care at the county hospital." 1965 Ala. Acts 388, § 12.

The Supreme Court of Alabama has held, for example, that the sale of hearing aids by the University of Alabama Speech and Hearing Center is incidental and integral to the audiology program of the Speech and Hearing Center. Churchill v. Board of Trustees, 409 So. 2d 1382 (Ala. 1982).

41 Legislative action, if any, is preferable because it is only prospective in operation. Alternatively, and less satisfactorily from the point of view of the national importance of the health care services at stake, reliance interests can be satisfied to some degree by making a decision prospective only. Here,

over, it would be most inequitable to impose treble-damage liability on the manufacturing respondents—whose profits have not been enhanced by the granting of lower prices to governmental purchasers—for pricing their products in accordance with almost fifty years of common understanding that their conduct was entirely lawful.

II.

CONGRESS' FAILURE TO INCLUDE GOVERNMENTAL PURCHASES IN THE NONPROFIT INSTITUTIONS ACT OF 1938 CONFIRMS ITS INTENT NOT TO COVER SUCH PURCHASES IN THE ORIGINAL ROBINSON-PATMAN ACT

In 1938, the same year that Representative Patman wrote in his authoritative treatise that the Robinson-Patman Act does not cover federal, state or municipal purchases, Congress enacted the Nonprofit Institutions Act, 15 U.S.C. § 13c (1976). This statute exempted from the application of the Robinson-Patman Act "purchases" for their own use by schools, colleges, universities, public libraries, churches, hospitals and charitable institutions not operated for profit.[42]

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each of the alternative tests for ruling prospectively is fulfilled, including establishment of a new principle of law and the creation of inequities, injustice and hardship by retroactive ruling. Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971). *See also* cases applying holdings prospectively where city and state activities were involved. Lemon v. Kurtzman, 411 U.S. 192, 197-200 (1973); City of Phoenix v. Kolodziejski, 399 U.S. 204, 213-14 (1970); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969).

42 The Act, 15 U.S.C. § 13c, provides:

"Exemption of non-profit institutions from price discrimination provisions.

"Nothing in the Act approved June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public

This Court addressed the Nonprofit Institutions Act in another context in *Abbott Laboratories v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1 (1976). *Abbott Laboratories* concerned an entirely different issue: the application of the Act's "own use" provision to sales to non-governmental, nonprofit hospitals. The Court there considered neither the scope of the initial Robinson-Patman Act nor the extent of the 1938 Act's coverage with regard to governmental purchases, but noted without criticism that the district court had dismissed counts based on sales to governmental hospitals "for failure to state a claim." 425 U.S. at 4 n.2. Petitioners in that case had not appealed from that decision.[43]

As we shall demonstrate, the Nonprofit Institutions Act was not intended to cover federal, state or municipal governments. It follows that, in omitting the government from this exemption, Congress assumed that there was no need expressly to exempt government agencies because they were not covered in the first place by the 1936 legislation. Otherwise, Congress would be in the anomalous position of having treated eleemosynary institutions (which are exempted under the 1938 amendment) more favorably than government agencies and in particular non-governmental nonprofit hospitals, schools, colleges, universities and libraries better than their government counterparts. *See* 656 F.2d at 102.

Congress' basis for concluding that the Robinson-Patman Act, enacted two years earlier, did not cover government

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libraries, churches, hospitals and charitable institutions not operated for profit."

43 Petitioner cites the statements in *Abbott Laboratories* that "the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly." (Pet. Br. 16-17.) But the Court in its opinion also recognized that such general principles should not be used to undermine congressional intent as demonstrated in the legislative history—in that case, Congress' intent that sellers be allowed to continue "price favors . . . to eleemosynary institutions" despite the Robinson-Patman Act. 425 U.S. at 12.

purchases appears in the legislative history of the original Act and in Representative Patman's treatise published in 1938, which we have already reviewed. When Congress passes legislation amending or reenacting a prior statute and fails to overrule a prior interpretation, that is persuasive of its intent to leave the prior interpretation intact. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith v. Curran,* 50 U.S.L.W. 4457 (U.S. May 3, 1982); *United States v. American Building Maintenance Industries,* 422 U.S. 271, 280-81 (1975); *Zemel v. Rusk,* 381 U.S. 1, 11-12 (1965).

On its face there is nothing in the Nonprofit Institutions Act referring to federal, state or municipal governmental bodies. If Congress had intended to include the federal, state or municipal governments, it defies common sense to assume that it would have called them "nonprofit institutions," a term which in common understanding refers to charitable or eleemosynary entities. Indeed, Webster defines a "nonprofit" entity as an "agency supported by endowments and private contributions." *Webster's Third New International Dictionary* 1538 (16th ed. 1971).

As one court observed shortly after the 1938 legislation was enacted:

> "If Congress had intended to change such interpretation of the [Robinson-Patman] Act ["as not applying to governmental purchases"], it would undoubtedly have done so by specific language [in the Nonprofit Institutions Act] rather than by inference subject to subsequent judicial construction." *General Shale Products Corp. v. Struck Construction Co.,* 37 F. Supp. 598, 603 (W.D. Ky. 1941), *aff'd on other grounds,* 132 F.2d 425 (6th Cir. 1942), *cert. denied,* 318 U.S. 780 (1943).[44]

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44 In the proposed amendments filed subsequently in 1951 and 1953 to extend the original Robinson-Patman Act's coverage, Representative Patman referred specifically to the "United States, any state or any political subdivision thereof," not to nonprofit or eleemosynary institutions or for that matter to any specific types of governmental purchasing agencies. *See* discussion *supra* pp. 21-24.

The House and Senate Reports describe the intended beneficiaries of the 1938 Act as "eleemosynary institutions." Both the Senate and House Reports are entitled "Exemption of Eleemosynary Institutions From the Robinson-Patman Act," and so describe the bill.[45] Webster defines "eleemosynary" to mean "non-profit and receiving all or a great part of sustaining funds from donations or gifts". *Webster's Third New International Dictionary* 733 (16th ed. 1971). Indeed, "eleemosynary corporation" has historically been and continues to be a legal term of art for a "private corporation created for charitable and benevolent purposes." *Black's Law Dictionary* 467 (rev. 5th ed. 1979).[46] The Senate Report also states that the purpose of the Robinson-Patman Act will not be undermined if it is not applied to eleemosynary institutions "as they are not operated for profit."[47] The House Report states that the "wholesome purpose of the Robinson-Patman Act" will not be interfered with if "favors in price" are extended to "eleemosynary institutions, because of the character of the institution . . . ."[48] Neither Report speaks of the Amendment's applying to federal, state, county or city governments.

Finally, the only document in support of the need for legislation which is appended to both Reports is a letter from John H. Hayes, the President of the Hospital Bureau of Standards and Supplies, a nonprofit association of voluntary hospitals.[49] That letter explains how the "voluntary nonprofit

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45 S. Rep. No. 1769, 75th Cong., 3d Sess. 1 (1938); H.R. Rep. No. 2161, 75th Cong., 3d Sess. 1 (1938).

46 In Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 659-66 (1819), the Court determined that the entity in question was an "eleemosynary" or *private*, charitable corporation, as opposed to a corporation controlled by the government. *See* 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations*, § 56 at 288 (rev. perm. ed. 1974), in which "eleemosynary corporations" are defined as charitable, not-for-profit "private corporations."

47 S. Rep. No. 1769, 75th Cong., 3d Sess. 1 (1938).

48 H.R. Rep. No. 2161, 75th Cong., 3d Sess. 1 (1938).

49 S. Rep. No. 1769, 75th Cong., 3d Sess. 1-2 (1938); H.R. Rep. No. 2161, 75th Cong., 3d Sess. 1-2 (1938).

hospitals" provide relief for what "would otherwise be a burden on Federal, State, and municipal institutions" and asks that "these facts" be kept in mind when the proposed amendment "comes up for consideration of the Congress." In singling out this letter to be incorporated into both Reports, Congress demonstrated its intent to aid the "voluntary nonprofit hospitals" and similar non-governmental, nonprofit institutions, while recognizing their distinction from "Federal, State, and municipal institutions."

Yet another factor supporting the conclusion that Congress did not intend to include government schools, colleges, universities, hospitals and libraries in the Nonprofit Institutions Act is that such inclusion would have created a totally illogical distinction between such purchasers and other government agencies not enumerated in the 1938 Act. No rational legislature would treat purchases for governmental schools, hospitals and libraries as exempt under the 1938 Act and at the same time apply the Robinson-Patman Act to purchases for poorhouses, parks, cafeterias, community centers with meal and other programs, museums and other cultural centers with gift shops, day care centers and old age homes, transit, trash collection and police, to name but a few of the innumerable governmental functions and entities that under petitioner's view would be subject to the Robinson-Patman Act and are not named in the 1938 Act.[50] There is no logical basis to exempt government schools, hospitals and libraries while applying the Robinson-Patman Act to government purchases for these and other government agencies.

Under petitioner's and NARD's theory, these vital governmental agencies would *all* be treated less favorably than *any* charitable institution and less favorably than government

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50 Many of the categories of agencies that are not enumerated in the 1938 Act purchase supplies other than for their own use or engage in activities that may compete with private business.

schools, hospitals and libraries. The only rational interpretation of congressional intent is that when Congress passed the 1938 Amendment, it did so in the belief that sales to the government were already outside the scope of the initial Act, and therefore it did not include any government agencies in the Amendment. *See* 656 F.2d at 102.

While the reference in the 1938 Act to hospitals, schools, colleges and universities could be interpreted to include only eleemosynary, non-governmental institutions of that sort, it has been suggested that libraries are by definition governmental bodies and that the Act must therefore include governments. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 397 n.14 (1978) (NARD Br. 12 n.22). The predicate of that contention is erroneous. Libraries, like hospitals and schools, are often non-governmental, eleemosynary institutions. As defined in an American Library Association handbook of "concepts, definitions, and terminology," a "public library" is a library *open to the public,* generally free of charge, which may be privately controlled and funded:

> "In addition to the tax-supported municipal, county and regional public libraries, this definition includes privately controlled libraries which render, without charge, general library service to a community." American Library Association, *Library Statistics: A Handbook of Concepts, Definitions, and Terminology* 140 (1966).[51]

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51 The public library tradition began, in fact, in the United States as privately funded libraries open for public use. Following in the footsteps of the Library Company of Philadelphia, the first public subscription library in America and the "grandparent of American public libraries," which in turn was an outgrowth of Benjamin Franklin's "Junto", privately funded libraries open to the public were established in cities throughout America. *See* 9 *Encyclopedia of Library and Information Science* 85-86 (1973); E. Rose, *The Public Library in American Life* 15 (1954).

There are also numerous libraries which are funded from private endowments but are open to the public, as well as libraries which are privately

Moreover, a recent United Way report notes that 5,500 libraries are supported by private charitable organizations but are open to the public with free services.[52] It follows that the 1938 Act applies only to private, eleemosynary libraries as well as to schools, hospitals and other non-governmental charitable institutions.[53]

NARD's references to the floor debate on the 1938 legislation (NARD Br. 11-12) must be viewed in context, and in any event are subordinate to the expressions of intent in the House and Senate Reports. In the midst of lengthy debate over a proposed amendment on an entirely different point, Representative Sabath interrupted with a question expressing concern that state and local government institutions not be treated less favorably than private charitable institutions. Representative Walter—who was apparently intent on defending his bill from criticism—assured Representative Sabath that the government would not be in a less favorable position. Mr. Walter plainly did not focus on whether this would already be the case because the original Robinson-Patman Act did not cover government purchases in the first place. *See* 81 Cong. Rec. 8705-06 (1937).

The statement of congressional intent contained in the House and Senate Reports that only eleemosynary institutions

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endowed and independent although they receive some tax support. *See* E. Rose, *The Public Library in American Life* 17 (1954); V. Young, *The Library Trustee* 46 (1964); Huntington Library, Art Gallery and Botanical Gardens, 1979-80 Annual Report (1980).

52 Report by United Way of America, *Barn Raising and Bucket Brigades* (1982).

53 Apart from its inaccurate factual basis, footnote 14 in *City of Lafayette* should not be construed as determinative here since the Court there examined neither the history of the Robinson-Patman Act generally nor the 1938 Amendment specifically (*see* discussion *infra* pp. 42-44). The citations set forth in the footnote do not contradict the fact that there are thousands of non-governmental libraries open to the public. The Office of Education Reports and the American Library Association Bulletin demonstrate only that there are libraries supported by public funds and run by local governments, and indicate their number and source of funds.

are covered by the 1938 Act is more authoritative than Representative Walter's off-hand remark to reassure a Congressman who had interrupted the main subject of debate. *See Zuber* v. *Allen*, 396 U.S. 168, 186 (1969).

Congress continued to affirm that sales to the government were not covered by the Nonprofit Institutions Act in the 1968 Report of the Select Committee on Small Business discussed earlier (*supra* pp. 24-26). The report incorporated testimony of Earl W. Kintner, former Chairman of the FTC, who appeared on behalf of NARD. After separately categorizing sales to federal, state and municipal government institutions as probably exempt from the Robinson-Patman Act, he explicitly limited the 1938 Act to "private nonprofit institutions," a position contrary to that now advanced by NARD as amicus (NARD Br. 11-14). H.R. Rep. No. 19, 90th Cong., 2d Sess. 7-8 (1968). In the "Conclusions" to the Report, the subcommittee in its own words noted the distinctions between categories of purchasers and observed: "The Nonprofit Institutions Act of 1938 is designed to afford immunity to *private* nonprofit institutions (like hospitals so organized), from the prohibitions of the Robinson-Patman Act . . . . " H.R. Rep. No. 19, 90th Cong., 2d Sess. 78 (1968) (emphasis supplied).

Under the authorities reviewed in Point I, *supra* pp. 18-21, the fact that the issues were forcefully brought to Congress' attention and a committee concerned with the subject was made aware and itself stated that the 1938 Act was regarded as only applicable to private nonprofit institutions, is most significant in assessing congressional inaction thereafter. *See, e.g., CBS, Inc. v. FCC,* 453 U.S. 367, 101 S. Ct. 2813, 2823-24 (1981); *Power Reactor Development Co. v. International Union of Electrical Workers,* 367 U.S. 396, 408-09 (1961).

Taken in light of the wording of the Act, its logic and congressional committee reports, it is apparent that Congress did not initially intend and continues not to intend to include government purchases in the Nonprofit Institutions Act. And that compels the conclusion that the only sensible legislative scheme would also exclude government purchases from coverage under the Robinson-Patman Act itself.

III.

IN VIEW OF THE LEGISLATIVE HISTORY AND OTHER EVIDENCE SUPPORTING NONCOVERAGE OF GOVERNMENT PURCHASES UNDER THE ROBINSON-PATMAN ACT, CASES INVOLVING OTHER STATUTES ARE BESIDE THE POINT

Petitioner and amicus NARD argue that the Court's recent decisions in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), and *Community Communications Co. v. City of Boulder*, 102 S. Ct. 835 (1982), are inconsistent with the decisions below. There is no such inconsistency. Those decisions dealt exclusively with the Sherman Act. The Court did not have before it or have reason to consider the extensive legislative history, rejection of amendments, post-enactment committee reports, case law and other material reviewed here to demonstrate Congress' intent when enacting the Robinson-Patman Act. For that reason, the Court in those cases drew inferences based solely on general principles which are less pertinent here.

Since respondents do not rely on the state action exemption implied in *Parker v. Brown*, 317 U.S. 341 (1943), there is no occasion to consider the outer limits of this doctrine or its application to political subdivisions, which was delineated in *City of Lafayette* and *City of Boulder*. Indeed, we are aware of no case in which a court has ever discussed or applied the state action doctrine in connection with a Robinson-Patman Act claim. The *Parker* doctrine deals with the legality of state regulatory programs under the Sherman Act. In *Parker*, the Court held the program at issue to be beyond the Sherman Act's scope based on principles of federalism and because nothing in the Sherman Act's legislative history suggested a purpose to restrain acts of state government. Here, there is no need for implications based on principles of federalism since the sole issue is the meaning of a federal statute and there is specific legislative history, rejection of amendments and other evidence that Congress did not intend to cover sales to state or

other governmental purchasers. *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974); *Apex Hosiery v. Leader*, 310 U.S. 469 (1940).

The Court in *City of Lafayette* also considered whether Congress intended to subject local governments to the Sherman Act; but it did so in the absence of any evidence of legislative intent, denying such coverage solely on the basis of an abstract definition of the word "person" in the Sherman Act. 435 U.S. at 394-97. Again, the issue here is not the definition of "person" but whether, in light of all the indicia of congressional intent, the Robinson-Patman Act covers government purchases.[54]

The Court in *City of Lafayette* relied in part on "the legislative history of the Sherman Act" indicating that Congress was "exercising the full extent of its constitutional power." 435 U.S. at 398. That statement, however, is not applicable here. Even if such a generalization could override the specific legislative history and other evidence of congressional intention present in this case, the plain fact is that the Robinson-Patman Act did not invoke the full exercise of Congress' commerce power. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194-95 (1974).

The cases involving non-antitrust statutes cited in *City of Lafayette* similarly involved attempts to define the word "person" to include states or municipalities against backgrounds of legislative intent markedly different from that of the Robinson-Patman Act. 435 U.S. at 400-02 & nn.19-21. Thus, in *California v. United States*, 320 U.S. 577 (1944), the Court cited explicit statements in the legislative history of the Shipping Act of 1916 which "left no doubt that the legislation was designed to prevent discrimination no less by public than by

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54 The definition of "person" under the Sherman Act in *City of Lafayette* would not be determinative here even if extended to the Robinson-Patman Act. The manufacturing respondents are concededly "persons" under the Act. The issue is whether the state and county defendants are "purchasers" and whether sales to these government agencies were intended to be covered.

private owners. 53 Cong. Rec. 8276." 320 U.S. at 585-86.[55] The remaining cases involved abstract definitions of "person" in the absence of any specific legislative history of the kind reviewed here.[56]

In sum, there is no need in this case to consider whether to imply an exemption like the "state action doctrine" discussed in *City of Lafayette* and *City of Boulder,* both of which involved the Sherman Act only. With respect to the Robinson-Patman Act, there are definitive legislative history and other indicia which establish a manifest congressional intent not to cover sales to governmental purchases.

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55 The Court in *California* also noted that Congress knew that a large portion of the nation's dock facilities were publicly owned and "it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies." 320 U.S. at 585-86. The same cannot be said of the purpose of the Robinson-Patman Act.

56 Ohio v. Helvering, 292 U.S. 360 (1934), cited at footnote 20 of *City of Lafayette,* involved the application of a principle of tax law that the state is not immune from federal taxation because dealing in intoxicating liquors was not a governmental function. (*See* discussion *supra* pp. 32-33 that health care is a traditional government function.)

Union Pacific Railroad v. United States, 313 U.S. 450 (1941), cited at footnote 19 of *City of Lafayette,* concerned the question, again in the absence of specific legislative history, of whether carriers or shippers were the only "persons" covered. Moreover, in contrast to the Robinson-Patman Act which was directed at the large chain stores, it was clear that in enacting the Elkins Act, "the purpose of Congress was to cut up by the roots every form of discrimination, favoritism and inequality . . . ." Louisville and Nashville Railroad v. Mottley, 219 U.S. 467, 478 (1911).

Finally, the Court there found that the railroad and city were attempting to improperly "cloak" their private arrangement to grant discriminatory advantages to shippers under the guise of "promotion of civic advancement" when in fact the railroad had dominated the city's action for its private benefit. 313 U.S. at 465. This concept developed into an exception to the state action doctrine when it was announced in Parker v. Brown, 317 U.S. 341, 351-52 (1943), citing *Union Pacific* as an example. *See also* Cantor v. Detroit Edison Co., 428 U.S. 579, 592-93 (1976). Neither the state action doctrine nor this exception has any relevance to the instant case.

CONCLUSION

The Court of Appeals correctly determined that Congress did not intend to cover sales to federal, state or local governments within the Robinson-Patman Act. During the past forty-six years, federal, state and local agencies and their suppliers have justifiably relied on the consistent interpretation of Congress, the courts and enforcement authorities that the Act does not cover their transactions. Any reconsideration of Congress' refusal to expand the Robinson-Patman Act to cover government purchases should be left to Congress.

For all the foregoing reasons, it is respectfully requested that the decision of the Court of Appeals be affirmed in all respects.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS

Robinson-Patman Act

§ 2(a) provides in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

§ 2(f) provides:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

Respondent's Brief

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No. 81-827

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.,
Petitioner,

v.

ABBOTT LABORATORIES, a corporation; CIBA-GEIGY CORPORATION, a corporation, d/b/a CIBA Pharmaceutical Company; AMERICAN CYANAMID CO., a corporation, d/b/a Lederle & Labs. Division; PARKE-DAVIS & CO., a corporation; CHARLES PFIZER & CO., INC., a corporation, formerly known as E. R. SQUIBB & SONS, INC., d/b/a Squibb Pharmaceutical Company; THE UPJOHN CO., a corporation; AMERICAN HOME PRODUCTS CORP., a corporation, d/b/a Wyeth Laboratories and d/b/a Ayerst Laboratories; BRISTOL-MYERS COMPANY, a corporation, d/b/a Bristol Laboratories; MERCK SHARP & DOHME ORTHOPEDICS COMPANY, INC., a corporation; HOFFMAN-LA ROCHE, INC., a corporation; G. D. SEARLE & CO., a corporation, d/b/a Searle Laboratories; TRAVENOL LABS, INC., a corporation, d/b/a Flint Laboratories; THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, d/b/a University of Alabama Hospital Pharmacy and Russell Ambulatory Center Pharmacy; COOPER GREEN HOSPITAL, a non-profit corporation, d/b/a Cooper Green Hospital Pharmacy,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Brief of Respondent, The Board of Trustees of the University of Alabama

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PARTIES TO THE PROCEEDING

Petitioner incorrectly identifies this respondent in its brief (Pet. br. p. 4) and on the cover to petitioner's brief. This respondent's correct name is The Board of Trustees of the University of Alabama. Respondent was correctly identified in the Complaint. (J.A. 6a, para. 17).

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CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant statutory provisions are set forth in briefs filed with the Court by the other parties. In addition to those provisions, the following constitutional amendment pertains to this action:

U.S. Const. amend. X

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

No. 81-827

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.,
Petitioner,

v.

ABBOTT LABORATORIES, a corporation, et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Brief of The Board of Trustees of the University of Alabama

STATEMENT OF THE CASE

In order to clarify the nature of the purchases which were held by the courts below to fall outside the Robinson-Patman Act, a brief supplement to petitioner's Statement of the Case will be made.

The Board of Trustees of the University of Alabama (hereafter referred to as "the University," "the State" or "Alabama") operates a medical center including hospitals in conjunction with the State university and medical school which it also operates in Birmingham, Alabama. Located in the university medical center are two pharmacies which

are charged with having purchased pharmaceuticals in violation of the Robinson-Patman Act, § 2(f), 15 U.S.C. § 13(f) (1976).

There is no suggestion or allegation in the record that Alabama's pharmacies are independent, self-operating entities engaged in the business of a retail drug store. Rather, the pharmacies are integral components of Alabama's hospital system which, taking the allegations of the Complaint as true for purposes here, have "received discriminatorily lower prices than the prices paid" for similar goods by petitioner's assignors. (J.A. 9a-10a)

SUMMARY OF THE ARGUMENT

The Robinson-Patman Act does not cover governmental purchasers. The conclusion is supported by the rule of statutory construction which prohibits an interpretation that poses a significant risk of constitutional infirmity, absent a clear, affirmative expression of Congressional intention. *NLRB v. The Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Application of the Robinson-Patman Act to Alabama would interfere with all of the State's integral and traditional operations, not only those incidental to its promotion of education and health care. Such interference with the State's functions would threaten rights reserved to the State by the Tenth Amendment and thus cannot be presumed to have been intended by Congress. The Act's failure explicitly to cover governmental purchasers also compels the conclusion that government is not covered, since Congressional intention to restrict the rights of government will not be presumed. *See, e.g., Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979).

Legislative history of the Robinson-Patman Act exhibits a Congressional intent to exclude government from the Act, and a belief by Congress that the exclusion would be

recognized without the need for explicit language in the statute due to the rules of statutory construction noted above. Subsequent to its enactment, the Robinson-Patman Act has been construed as not covering government by the Attorney General of the United States, the Federal Trade Commission, federal courts, Representative Patman, the co-sponsor of the Act, authoritative texts, and even the amicus curiae here, the National Association of Retail Druggists. These views were communicated to Congress, which not only failed to disagree with these interpretations, but reaffirmed its intent not to regulate government by failing to enact amendments proposed to bring governmental purchases within the Act.

ARGUMENT

I.
THE ROBINSON-PATMAN ACT DOES NOT APPLY TO PURCHASES BY GOVERNMENT

A. Constitutional Principles Demand That Absent a Clearly Expressed Affirmative Intention of Congress to Cover Governmental Purchases, the Robinson-Patman Act Should Not Be So Construed.

Respondent, The Board of Trustees of the University of Alabama, is an arm of the State of Alabama entrusted under the Alabama Constitution with the management and control of the state university, the University of Alabama. Ala. Const., § 264.[1] Since the University is a part of the State of Alabama, actions by the University, including pur-

[1]The University of Alabama has been a part of the State since the early nineteenth century. *See Cox v. Board of Trustees of the University of Alabama*, 161 Ala. 639, 645, 49 So. 814, 816 (1909) (describing the University as "an institution of the state, created, provided for, and preserved by the legislative power thereof, . . . for nearly 100 years . . . the subject and care of constitutional provisions").

chases it makes, constitute actions and purchases by the State of Alabama.[3] Thus, purchases for Alabama's hospital pharmacies have been correctly characterized as purchases by the State of Alabama.[5]

The prospect that prices paid by the State for purchases it makes for its numerous operations — not only for its universities and hospitals, but also for its highways, highway patrol, prisons, courts, parks, housing projects, office buildings, etc. — might be subject to the Robinson-Patman Act raises substantial questions under the Tenth Amendment to the United States Constitution. Because the constitutionality of the Robinson-Patman Act may depend upon how this Court construes the Act and its intended coverage, the rules of statutory construction advanced by petitioner do not apply.[6]

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[3]The Alabama Constitutional provision which bars actions against "the State of Alabama" applies to suits against the University, since actions against the University constitute actions against the State. *Hutchinson v. Board of Trustees of University of Alabama*, 47 Ala. App. 460, 256 So. 2d 279, *aff'd*, 288 Ala. 20, 256 So. 2d 281 (1971) (action alleging breach of implied contract with the University hospital dismissed due to State's immunity from suit); *Stevens v. Thames*, 204 Ala. 487, 488, 86 So. 77, 78 (1920) (describing the University as "a state agency" and one of "the different departments of the state"); *Cox v. Board of Trustees of the University of Alabama*, 161 Ala. 639, 648, 49 So. 814, 818 (1909) (describing the University as "a part of the state").

[5]The district court ruled and the circuit court agreed that: "The claims against the Board must . . . be treated as equivalent to claims against the State itself." 656 F.2d 92, 99. Accordingly, both courts below held that the Eleventh Amendment to the United States Constitution bars petitioner's claim for damages against the University. Petitioner did not challenge this conclusion and holding in its appeal from the district court's decision.

[6]There are additional reasons for rejection of petitioner's purported "rule" of statutory construction, beside the rule against reaching a constitutional issue, discussed immediately below in the text. The brief of respondents Abbott Laboratories, *et al.* ["Abbott Brief"] correctly notes that Congressional intent is always relevant to interpretation of federal statutes. *See* Abbott Brief at 9-10, and cases cited. For cases in which this Court examined legislative history to determine whether other federal statutes apply to government, where there was no contention as here that

Petitioner argues against resort to legislative history in order to determine the Act's coverage. This Court has directed, however, that where the application of a statute to a party "would give rise to serious constitutional questions," the Court "must first identify 'the affirmative intention of Congress clearly expressed' before concluding that the Act" applies. *Catholic Bishop* at 501. In *Catholic Bishop*, this Court determined that application of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, to church-operated schools would present "serious First Amendment questions." *Catholic Bishop* at 504. The Court expressly avoided deciding the constitutional issue, however, explaining that for purposes of statutory construction the Court should simply identify *potential* constitutional obstacles to the construction proposed by a party. The court explained:

> [A]t this stage of our consideration we are not compelled to determine whether the [Board's] entanglement [with the exercise of First Amendment rights] is excessive as we would were we considering the constitutional issue. Rather, we make a narrow inquiry whether the exercise of the Board's jurisdiction presents a significant risk that the First Amendment will be infringed.

Id. at 502.

Having decided that the case presented serious constitutional problems, this Court in *Catholic Bishop* deferred a resolution of the constitutional question and proceeded to examine the Act's legislative history to determine whether

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constitutional rights would be implicated, see *infra* pages 9-14, 18. Indeed, a basic principle of statutory construction, which pertains regardless of any constitutional impediment, provides that a statute will not be construed to bind the government—including States—unless the statute expressly so provides. *See Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979); cases cited in Abbott Brief at 15, n. 18.

the Act, which on its face applies very broadly to "employers", was intended by Congress to apply to church-operated schools. Legislative history, however, failed to reveal any explicit decision that church-operated schools were governed by the Act. Therefore, the Court concluded:

> Accordingly, in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.

440 U.S. at 507.

While *Catholic Bishop* involved a potential conflict between a statute and the First Amendment, the Court's discussion broadly referred to the possibility of conflict with any constitutional provision. *Id.* at 500. The rule of construction was certainly not limited to cases which involve the First Amendment and has in the past been applied to construe legislation so as to avoid conflict with the Tenth Amendment. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 29-30 (1937).[8]

Thus, when the proferred construction of a statute raises serious questions about a statute's constitutionality, it is incumbent upon the Court to search for congressional intent,

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[8]There the Court rejected a construction of the National Labor Relations Act that would apply it to all industry, regardless of its effect upon commerce, stating:

> If this [construction] were sound, the Act would necessarily fall by reason of the limitation upon the Federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. . . .
>
> . . . [A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. *Even to avoid a serious doubt the rule is the same.*

301 U.S. at 29-30 (emphasis added).

regardless of how broad the statute's language might appear on its face. The issue in *Catholic Bishop* was *not* whether church-operated schools are "employers" but whether application of the National Labor Relations Act to such schools would give rise to serious constitutional questions and, if so, whether legislative history evinces an "affirmative intention of Congress clearly expressed" to cover such schools. Similarly, the proper inquiry here is *not* whether the University is a "person" but whether application of the Robinson-Patman Act to it would give rise to serious constitutional questions and, if so, whether legislative history clearly demonstrates that Congress intended to subject State institutions to the Act. ***Absent a clear intent to cover States,*** the Act cannot be so construed.

Application of the Robinson-Patman Act to Alabama would surely implicate the principles embodied in the Tenth Amendment to the United States Constitution. Both the district court and the court of appeals below considered that the Tenth Amendment constituted "additional support" for the conclusion that State purchases are beyond the reach of the Robinson-Patman Act. 656 F.2d at 102. If the pervasive language of the Act were to apply to State governments, it would apply to all State operations, not just to university pharmacies which might sell to the general public. If the Act were to apply to the State, the State would lose price advantages and, therefore, would be compelled to make up the difference in available funds by cutting back State services or by levying more taxes. A higher price paid by the University pharmacy inevitably translates into less money available for the University or for other State functions. For example, if the Robinson-Patman Act were construed to apply only to State purchases for resale — and there is no indication of any such bifurcated intent on the part of Congress — the result could well be the restric-

tion or elimination of vital services by the State in the health care area or in some other traditional area.[6]

These Tenth Amendment concerns are clearly not frivolous but rather are of sufficient import to warrant a careful inquiry into Congressional intent. This Court need never actually decide the Tenth Amendment question unless it first decides that Congress intended the Robinson-Patman Act to cover States. Under the rule of construction enunciated in *Catholic Bishop*, as well as under the parallel rule of construction regarding application of statutes to government,[7] unless a clear expression of Congressional intent to cover States can be found, the Robinson-Patman Act should not be so construed. As demonstrated below, the legislative history of the Robinson-Patman Act does *not* reveal an affirmative Congressional intent to cover purchases by government, but to the contrary, reveals that Congress clearly intended that the Act not reach such purchases.

B. Legislative Intent Regarding Coverage of the Robinson-Patman Act Cannot Be Found in Decisions Construing the Sherman Antitrust Act, Or Any Other Act.

Amici Curiae propose a facile resolution of the issue presented here under the Robinson-Patman Act by citing cases which have applied the Sherman Antitrust Act to States and State actions. The Sherman Act cases which consider that Act's applicability to action by government (city, State or federal) were decided based upon an understanding of Congressional intent *regarding the Sherman Act*. Sherman Act precedent contributes nothing to resolution of the issue now before the Court.

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[6]We develop further, in Section II of the Brief, why the construction of the Act proposed by petitioner poses a significant risk that the Tenth Amendment will be infringed.

[7]See note 4 *supra*.

For example, when a question was raised regarding the right of the United States to prosecute an action for treble damages under the Sherman Act, which by its terms authorizes "any person" to sue for treble damages, the United States Supreme Court reasoned that resort to legislative history under the Sherman Act was necessary:

> Since, in common usage, the term "person" does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law.

United States v. Cooper Corp., 312 U.S. 600, 604-05 (1941).

The Court warned that "it is not for the courts to indulge in the business of policy making in the field of antitrust legislation" and advised:

> Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress.

Id. at 606.

In reaching its conclusion that the United States may not sue for treble damages under the Sherman Act, this Court relied upon the legislative history of the Sherman Act, subsequent statements by some courts and by a Senator that the Sherman Act does not afford the United States the right to sue for damages, Congress' failure to amend the Act to grant expressly the right so as to override these statements of non-coverage, a 1926 statement by the Attorney General, a pending bill in Congress which would permit the United States to bring suit for damages under the Sherman Act, and the fact that, "in the fifty years during which the stat-

ute has been in force," the United States had failed to bring any suit for damages under the Sherman Act until it brought suit in *Cooper*. *Id.* at 613-14. The very same kinds of evidence pertaining to the intended coverage of the Robinson-Patman Act and discussed in this brief demonstrate that the Robinson-Patman Act was not intended to cover governmental purchases.

One year after this Court decided in *Cooper* that the United States government may not maintain an action for treble damages under the Sherman Act, it decided that a State may maintain such an action. *Georgia v. Evans,* 316 U.S. 159 (1942).

The Supreme Court in *Georgia* referred specifically to *Cooper's* instruction that application of a statute to government depends upon the statute's 1) purpose, 2) subject matter, 3) context, 4) legislative history, and 5) executive interpretation, all of which are indicative of Congress' intent. *Id.* at 161. In concluding that a State may maintain a damages action under the Sherman Act, the Court explained that "[n]othing in the Act, its history, or its policy, could justify so restrictive a construction of the word 'person' in § 7, 15 U.S.C.A. § 15, as to exclude a State." *Id. at* 162.

In deciding that the legislative history of the Sherman Act supports the right of states to sue for damages under the Act, the Supreme Court in *Georgia* clearly never considered the legislative history of the Robinson-Patman Act or whether that history supports the liability of states, as favored purchasers, under the Robinson-Patman Act. Thus, the holding in *Georgia* is not relevant to the issues now before the Court, although *Georgia's* confirmation of the need to examine relevant legislative history applies here.

One year after ruling in *Georgia* that states may maintain actions under Section 7 of the Sherman Act, the Su-

preme Court decided *Parker v. Brown*, 317 U.S. 341 (1943). Unlike *Cooper* and *Georgia*, in *Parker* the issue was not whether under the Sherman Act government could sue or be sued. Yet, as in *Cooper* and *Georgia*, the issue presented — whether a private plaintiff could enjoin enforcement of California's raisin-marketing program, adopted pursuant to a California statute, as violative of the Sherman Act — was resolved by an inquiry into the purpose and legislative history of the Sherman Act:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.
>
> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. . . . A state may maintain a suit for damages under it, *Georgia v. Evans* . . . but the United States may not, *United States v. Cooper Corp.* . . . conclusions derived not from the literal meaning of the words "person" and "corporation" but from the purpose, the subject matter, the context and the legislative history of the statute.

Id. at 350-51.

In *Parker*, the Court based its decision upon the *absence* of any expressed legislative intent that the Sherman Act cover State action. *Id.* at 351- 52. The Court did *not* require, nor even find, an affirmative expression of legislative intent that State action was outside the Act's coverage. *Compare Catholic Bishop* (absent a clear expression of intent to cover church-operated schools, such an intent will

not be inferred). Similarly, in this case, the "burden" is upon petitioner to demonstrate a *clear expression* of Congressional intent that States are subject to the Robinson-Patman Act. As we will show below, not only is there no such positive affirmation of Congressional intent, but also the evidence of Congressional intent is exactly to the contrary. Whereas the Sherman Act's legislative history is silent as to its application to States, the legislative history of the Robinson-Patman Act is *not* silent regarding coverage of States but instead affirmatively indicates that State purchases are not subject to the Act.

The decisions since *Parker* which have considered the application of the Sherman Act to alleged State action continue to recognize that the *Parker* doctrine is based upon Congressional intent respecting the Sherman Act. *Community Communications Co. v. Boulder*, ____ U.S. ____, 70 L. Ed. 2d 810, 826 (1982) ("This court decided in *Parker* that Congress did not intend the Sherman Act to override state legislation designed to regulate the economy") (J. Brennan, dissenting); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 408 (1978) (". . . Parker held that, *in the absence of Congressional intent to the contrary*, a purpose that the antitrust laws be used to strike down the state's regulatory program imposed as an act of government would not be inferred") (emphasis added).

Accordingly, the "state action" cases under the Sherman Act have no bearing upon a suit under the Robinson-Patman Act since they did not consider the purpose or legislative history of the Robinson-Patman Act.

For the same reason, cases which consider whether States must comply with other statutes, which by their terms apply to all "persons," do not aid in the determination of whether the Robinson-Patman Act applies to a State. Rather,

> [w]hether the term "person" when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment.

Sims v. United States, 359 U.S. 108, 112 (1959) ("legislative environment" includes the statute's subject matter, context, legislative history and executive interpretation).

The same rule of construction was applied in *California v. United States*, 320 U.S. 577 (1944), cited by the National Association of Retail Druggists [hereinafter referred to as "NARD"] (NARD Brief, p. 23 note 47). There this Court upheld an application of the Shipping Act to a State and a city after noting that the Congress knew that such a large portion of the nation's docks are owned by government, that it would therefore "have defeated" the statute's purpose to exempt government, and that express references to government in the *Congressional Record* "left no doubt that the legislation was designed to prevent discrimination . . . by public [and] by private owners." *Id.* at 585-86. The Court explained that in determining whether government is subject to federal regulation,

> The crucial question is whether the statute, read in the light of the circumstances that gave rise to its enactment and for which it was designed, applies also to public owners . . .

Id. at 585. *Compare, Monell v. New York City Department of Social Service*, 436 U.S. 658, 664-690 (1978) (Civil Rights Act of 1871 applied to municipalities after lengthy consideration of legislative history which revealed Congress' intention that "persons" include local government).

Clearly, the question of the Robinson-Patman Act's treatment of governmental purchases requires an independent examination of the purposes and legislative history of the Robinson-Patman Act, and cases decided under the Sherman Act or other statutes provide no assistance except

to confirm that an examination of Congressional intent is necessary. Examination of the Act's legislative history – as called for in the cases construing other federal statutes – demonstrates that Congress did not intend to regulate government in any way.

C. The Robinson-Patman Act Was the Result and Product of Congressional Concerns About, and Investigation of, Anti-Competitive Pricing Activities of Large Chain Stores and Other Private Corporate Purchasers.

The Robinson-Patman Act was enacted to strengthen and expand the Clayton Act's regulation of pricing practices by private businesses. Neither the Clayton Act of 1914 nor the Robinson-Patman amendment in 1936 was motivated by a concern about the purchasing practices of governmental agencies. This Court has explained the impetus of the Robinson-Patman Act as follows:

> The section, when originally enacted as part of the Clayton Act in 1914, was born of a desire by Congress to curb the use by *financially powerful corporations* of localized price-cutting tactics which had gravely impaired the competitive position of other sellers. It is, of course, quite true – and too well known to require extensive exposition – that the 1936 Robinson-Patman amendments to the Clayton Act were motivated principally by congressional concern over the impact upon secondary-line competition of the burgeoning of mammoth purchasers, notably *chain stores*.

FTC v. Anheuser-Busch, 363 U.S. 536, 543-44 (1960) (emphasis added).

As noted in *Anheuser-Busch,* the original Clayton Act was enacted to condemn pricing practices of "the great corporations," "notably the Standard Oil Co., and the Ameri-

can Tobacco Co." S. Rep. 698, 63d Cong., 2d Sess. 2-4 (1914); H. Rep. 627, 63d Cong., 2d Sess. 8-9 (1914). In enacting the Clayton Act, Congress explained that the "necessity for such legislation is shown by the fact that nineteen States have enacted laws forbidding this particular form of discrimination within their borders," but that the State laws could not reach the geographic price discriminations practiced by multistate sellers, which sold at uniform prices within each State, but at different prices in different States. *Id.* Without legislation at the federal level, a corporation could lawfully sell at a single, predatorily low price in one State, and subsidize it by a higher price in other States. Congress accordingly intended to nationalize the price discrimination prohibitions against this evil which were already in force in nineteen States. Section Two of the original Clayton Act, and the State statutes which served as its model, were concerned with abuses by *sellers*, not purchasers. Those statutes were clearly not aimed at States, regardless of whether the States acted in selling or purchasing capacities or whether they were the victims, beneficiaries, or perpetrators of the discrimination. Such governmental affairs were not the concern of Congress in 1914.

When Congress amended Section Two of the Clayton Act in 1936, its purpose was to strengthen the Act in areas which were again unrelated to purchases or sales by government. Like the original Section Two, the Robinson-Patman amendment was aimed at the private sector, though it was motivated primarily by abuses of multistate merchant *purchasers*, notably the "corporate chains." Report of the United States Department of Justice on the Robinson-Patman Act 1, 5, 104 (1976); *see* FTC, Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935). The Robinson-Patman Act was thus designed to bolster and correct deficiencies in the Clayton

Act, none of which was attributed to governmental purchases whether or not they were made for resale.[8]

D. The Legislative History of the Act Establishes an Intent by Congress to Exclude Governmental Purchasers, Federal and State, From Its Coverage.

The only references to governmental purchases in the *Congressional Record* are those by Mr. H. B. Teegarden, a representative of the United States Wholesale Grocers Association, who assisted Rep. Patman and Sen. Robinson in drafting the bills initially introduced in Congress in 1935 which led to the passage of the Robinson-Patman Act. W. Patman, *Complete Guide To The Robinson-Patman Act* 84 (1963).[9]

Petitioner has isolated one statement by Mr. Teegarden in support of its contention that the State is subject to the Robinson-Patman Act. Mr. Teegarden hypothesized that if a private and a city hospital were in competition with each other, "I should say that the fact that one is operated by the city does not save it from the bill." *Hearings before the House Committee of the Judiciary on Bills to Amend the Clayton Act*, 74th Cong., 1st Sess. 209 (1935) [hereinafter referred to as *"1935 Hearings"*]. Immediately following that statement, the following comments were made:

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[8] *The Committee on the Judiciary, House of Representatives*, 74th Cong. 1st Sess., 247-48 (1935); *The Legality of Discrimination Under the Robinson-Patman Act*, 36 COLUM. L.REV. 1285 (1935); *Changes in Federal Price Discrimination Law Effected By the Robinson-Patman Act*, 23 VA. L.REV. 201, 23 VA. L.REV. 316 (1937).

[9] Mr. Teegarden functioned as Mr. Patman's "factotum—drafting, analyzing and explaining for the benefit of the Committee." Rowe, *The Evolution of the Robinson-Patman Act*, 57 COLUM. L. REV. 1059, 1068 n. 44, 1067 (1957). Rep. Patman once declared that "Mr. Teegarden wrote this bill." *Hearings Before the House Committee of the Judiciary on Bills to Amend the Clayton Act*, 74th Cong., 1st Sec. 9, 27-28 (1935).

> Mr. Hancock. You would have to bid to the city, county, exactly the same as anybody else, same quantity, same price, same quality?
> Mr. Teegarden. No.

Ibid.

The foregoing response is inconsistent with his initial answer that city hospitals are subject to the Act. Even if these two comments about city hospitals and competitive bidding were the only expressions of Congressional intent — which they are not — they fail to demonstrate, *affirmatively* or *clearly*, that Congress intended governmental purchases to be subject to the Act. Mr. Teegarden's remark that a seller need *not* bid to a city or county at the same price as it does to others casts considerable doubt upon his earlier remark about a city hospital. Furthermore, his comment about a *city* hospital did not speak of any liability by a *county* or *State* hospital under the Act.

In any event, Mr. Teegarden *subsequently* stated, quite *unambiguously*, that governmental purchases are not covered by the Act. He premised his interpretation not upon the absence of competition between government and private industry, but significantly upon principles of sovereign immunity. In a written brief later submitted to the House Judiciary Committee, Mr. Teegarden observed:

> 2. Would the bill prevent competitive bidding on Governmental purchases below trade price levels?
>
> This question was raised by a member of the committee at the hearing. The answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives, or privileges of the sovereign unless it so expressly provides — a principle inherited by American jurisprudence from the common law . . .

1935 Hearings at 250.

The principle regarding application of a statute to a sovereign applies to both State and federal government, and nothing in Mr. Teegarden's response would limit it to federal government. The sovereignty of States was expressly recognized by this court in *Cooper, Georgia* and *Parker, supra.* A State's sovereign status was also confirmed in *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 415, 424, 435 (1819), in which the Court stated:

> In America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.
>
> • • •
>
> The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission.

This Court has recently reaffirmed the sovereignty of States, as well as the rule of statutory construction relied upon by Mr. Teegarden. In *Omaha Indian Tribe,* this Court considered whether "sovereign States of the Union" were included within the term "white persons," as used in a federal statute. 442 U.S. at 667. The Court declared:

> [I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it . . . Particularly is this true where the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage.

Id.

As the Supreme Court stated in *M'Culloch, supra,* a State's sovereignty "extends to everything" and does not disappear when the State provides services (such as selling pharmaceuticals) which are also provided by private in-

dustry. Neither does the State's sovereignty disappear when the services are provided by counties which "exist by [the state's] own authority." 17 U.S. at 435. *See also, National League of Cities v. Usery*, 426 U.S. 833, 855 note 20 (1976).

If Mr. Teegarden did not consider this principle when he opined about city hospitals, he embraced it, after reflection, in preparing his later written brief.[10] Clearly Mr. Teegarden repudiated his earlier remark, as his subsequent written statement unambiguously reported to Congress that the Act would not apply to governmental purchasing. This written statement is the last reference to government in the hearings and must reflect the understanding of Congress when the Act was finally adopted. To now construe the Act to cover government would be contrary to the intentions and understanding of the Congressmen who relied upon Mr. Teegarden's assurances.

E. Authoritative Interpretations of the Act Contemporaneous With Its Passage Unanimously Reflect the View that Governmental Purchasers Are Not Subject to the Act.

A contemporaneous construction of a new law by an official charged with its enforcement is highly persuasive of the statute's proper meaning. *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933).

Six months after the Robinson-Patman Act was passed, the United States Attorney General responded to an inquiry by the Secretary of War regarding the Act's application "to government contracts for supplies." 38 Op. Att'y.

[10] In the brief, Mr. Teegarden not only interpreted the Act's *prohibitions* as directed to non-governmental entities, but he also stated that the Act's *benefits* would accrue to private entities. *1935 Hearings* at 261 (recommending passage "for the protection of private rights.")

Gen. 539, 1932-39 Trade Cas. (CCH) ¶ 55,145 (Dec. 28, 1936). In ruling that such contracts are outside the Act, the Attorney General explained his conclusion on the same grounds cited by Mr. Teegarden:

> . . . [Statutes] regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government. . . .
>
> The Act of June 19, 1936, merely amended the Act of October 15, 1914 . . . and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts.

1932-39 Trade Cas. (CCH) ¶ 55,145, *supra*.

The Attorney General therefore had several reasons "for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters, in the absence of any clear indication that it intended to depart from that policy in this instance." *Ibid.*[11]

The Attorney General's opinion responded to a question about the Act's application to federal government supply contracts, but the rationale applies to any purchases at all levels of government. The opinion was interpreted as applying to local and State governmental purchases by the cosponsor of the Act, Rep. Patman, who wrote in 1938:

> *Question.* If a manufacturer sells to government, municipal, or public institutions at a lower price than he sells to his wholesale customers, is he in violation of the law if he does not make the same price for the same

[11]The Attorney General also relied upon *Emergency Fleet Corporation v. Western Union Telegraph Co.*, 275 U.S. 415, 425 (1928), in which this Court upheld the granting of favorable telegraph rates to a federal corporation that competed with private enterprise.

> quantity available to the wholesaler to whom he sells?
>
> *Opinion.* The Attorney General of the United States has ruled that the Act does not apply to the government . . . It may be presumed that the Attorney General's reasons may be also applied to municipal and public institutions.

W. Patman, *The Robinson-Patman Act* 168 (1938).

F. Subsequent Legislative Events Confirm That Governmental Purchases Are Outside the Act.

After enactment of the Robinson-Patman Act, bills were frequently introduced to amend the Act, hearings were held to consider amendments and reports, and studies were developed which discussed the Act's deficiencies and enforcement.[12] One authority on the Robinson-Patman Act, reviewing the Act's first twenty years, stated in 1957:

> Hardly a session of Congress passes without bills to fortify, modify, or clarify some Robinson-Patman provision. Public hearings by the Judiciary or Small Business Committees of both Houses year after year investigate either excesses or lags in Robinson-Patman administration, and exert constant pressure toward law enforcement in the direction of the public interest as perceived by transient committee majorities.

Rowe, *The Evolution of the Robinson-Patman Act: A Twenty Year Perspective*, 57 COLUM. L. REV. 1059, 1060 (1957).

Despite Congress' continued interest in the Act, and despite the fact that the Act had been interpreted by the United States Attorney General and the Act's co-sponsor, Rep. Patman, as not covering governmental purchases, and

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[12]Evidence of Congress' continued attention to the Act, and of its many opportunities to correct any interpretations with which it disagreed, are set forth in Appendix A. Full citations to hearings discussed above, as well as to bills, reports and remarks in Congress, appear in the Appendix.

despite the fact that it had numerous opportunities to do so, Congress never amended the Act to cover government.

Apparently the first occasion for Congress to reconsider the Robinson-Patman Act was in 1937 — the year following enactment — when a bill was introduced to exempt "purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit and supported in whole or in part by public subscriptions." 81 Cong. Rec. 8705 (1937). The bill was adopted in 1938 in a revised form to become 15 U.S.C. § 13c.

Judge Clark, who dissented from the opinion of the Fifth Circuit below, erroneously understood the exemption under Section 13c to apply to governmental hospitals. The sponsor of the amendment explained in 1937 that the bill's purpose was to override an interpretation by the Federal Trade Commission which applied the Act to eleemosynary institutions:

> The Federal Trade Commission has taken the position that the Robinson-Patman Act applies to all purchases, whether made by individuals or corporations, or corporations not organized for profit. The purpose of this bill is to enable an institution *maintained by public subscriptions* in whole or in part to receive discounts for purchases of goods for its own use.
>
> • • •
>
> It was our intention to include all eleemosynary institutions . . . it was the intention at the time the Robinson-Patman bill was discussed originally in our committee to exclude that type of corporation. We felt the provisions of the Act did not apply; however, the Federal Trade Commission has taken the position that it does.

Id. (emphasis added).

Mr. Walter was clearly speaking about charitable, not governmental, institutions. The term "public subscriptions" means voluntary contributions; governmental institutions are not supported by "public subscriptions." The Federal Trade Commission had apparently expressed its opinion that charitable institutions were subject to the Act, but there is no suggestion that the Federal Trade Commission has ever made any similar declaration regarding governmental purchasers.

After Mr. Walter had explained the bill's genesis, he was later asked, in the middle of House debate, whether the bill would cover institutions financed by cities, counties and States, and he responded that it would, as "[a]ll *charitable* institutions are covered." *Id.* at 8706 (emphasis added). Mr. Walter, however, clearly did not have governmental purchases in mind when he had earlier explained the bill's purpose, nor did he focus on governmental (as opposed to charitable) institutions in the remarks above. In any event, the bill under discussion at the time Mr. Walter made the foregoing remarks was rewritten, and there is no other reference in the Congressional record to government. Considering the amendment's impetus, the legislative history of the Robinson-Patman Act indicating its non-application to government, the Attorney General's 1936 opinion, and the lack of any Congressional intention evident in 1937 or 1938 *to subject* government to the Act, the 1938 amendment could not be construed as a restriction of the governmental immunity that had already been declared.[13]

[13]The "primary function of statutory construction is to effectuate the intent of Congress, and that function cannot properly be discharged by reliance upon a statement of a single Congressman, in the face of . . . countervailing considerations. . . ." *Federal Trade Commission v. Anheuser-Busch*, 363 U.S. 536, 555 (1960). Rep. Walter's references in 1937 to "charitable" institutions do not demonstrate that Congress in 1936 intended to subject government to the Robinson-Patman Act, particularly in view of the contrary evidence discussed, *supra*.

Significantly, Rep. Patman's book, published in 1938 after Mr. Walter had introduced the original bill to exempt non-governmental non-profit institutions, stated broadly that State and local government was not subject to the Act. Rep. Patman based his opinion upon the Attorney General's opinion and not upon the non-profit bill.

Subsequent Congressional activity confirms that Congress understood government not to be subject to the Act and not to be affected or limited by 15 U.S.C. § 13c, which applies only to purchases for the "use" of non-profit institutions. After 1937, Congress evaluated the Robinson-Patman Act on several occasions, but never expressed an understanding that government was subject to the Act.

On at least six occasions bills intended to extend the Act to governmental purchases were unsuccessfully introduced. H.R. 4452, 82d Cong., 1st Sess. (1951); H.R. 3377, 83d Cong., 1st Sess. (1953); H.R. 5213, 84th Cong., 1st Sess. (1955); H.R. 722, 95th Cong., 1st Sess. (1957); H.R. 155, 86th Cong., 1st Sess. (1959); H.R. 430, 87th Cong., 1st Sess. (1961).

The 1951 and 1953 bills would have amended the Act by adding a *new* section, immediately following Section 2(f) (pertaining to liability of buyers) to define "purchaser" to include "the United States, any State or any political subdivision thereof." These bills were introduced by Rep. Patman, who was already on record as having stated that the Act does not apply to "government," including "municipal and public institutions." W. Patman, *The Robinson-Patman Act* 168 (1938). Quite clearly, Rep. Patman considered that, without an amendment, the Act did not extend to governmental purchases.[14]

[14]Even Mr. Patman's amendments would not have imposed liability upon the State as a purchaser by merely defining "purchaser", because the Act does not impose liability upon a "purchaser" but rather upon any

Later, in 1955, Congress conducted hearings on price discrimination and the Robinson-Patman Act, *1955 Hearings, supra*. Congress heard from representatives of many interests, including NARD. *Id.* at 311-14. Congress failed to express any interest in extending the Act to government.

Congressional examination of the Act continued in the 1960's. In 1967 and 1968 Congress conducted public hearings on problems of small businesses in the drug industry. During seventeen days of testimony from retail druggists, pharmaceutical manufacturers, the FTC and the Department of Justice, the Committee was told that governmental hospitals frequently purchase drugs at lower prices than paid by retail pharmacies.[15] The Committee was told, and also concluded, that the price discrimination in favor of governmental hospitals was outside the Act.

The first witness to testify, immediately following preliminary remarks by Rep. Patman, was Earl W. Kintner, former Commissioner of the FTC, who appeared on behalf of NARD. Mr. Kintner first endeavored to explain how drug suppliers lawfully "may sell to institutions without

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"person" who (i) discriminates in price between "purchasers", Section 2(a), or (ii) knowingly induces or receives a discrimination in price, Section 2(f). However, Rep. Patman's bill would certainly have imposed liability upon any manufacturer which discriminates in price between government and other customers. Surely, if the word "purchaser" did not (absent an amendment) include government, then the word "person" did not include the government. Apparently Mr. Patman proposed to require suppliers to give the same prices to their government and private customers, but he was not prepared to go so far as to impose liability upon government if it received a favorable price.

[15]The Committee learned that virtually every major drug manufacturer sells to governmental (federal, State, county and city) hospitals at favorable prices. The sheer magnitude of this evidence prevents full treatment of it here, other than by page references. *1967-68 Hearings* 15, 16, 48, A4, A8, A21, A23, A28, A29, A73, A78, A79, A83, A88, A95, A103-04, 258, 296, 518-19, 519, 538, 544, 570, 666, 698, 705, 822, 836-37, 861, 1093-94. Many witnesses complained that the discrimination in favor of governmental hospitals adversely affected competition. *See, e.g., 1967-68 Hearings* at A-140-141, p. 253-62, 273, 291, 1093-94.

regard to the requirements of the Robinson-Patman Act" and, second, "how [they] may *violate* the mandate of the Robinson-Patman Act not to engage in price discrimination giving rise to adverse competitive effects." *1967-68 Hearings* 15. (Emphasis added). Respecting the first subject — when a supplier may disregard the Act — Mr. Kintner testified:

> When a drug supplier sells drugs to Federal, State, or municipal government institutions, the price charged by the supplier may be without regard to the Robinson-Patman Act.

Id. at 15-16.[16]

Mr. Kintner then discussed sales to nonprofit and for profit hospitals not meant for resale as another means by which a supplier may lawfully sell at discriminatory prices:

> A second category of institutional purchasers would be private non-profit institutions, most commonly hospitals, clinics, sanitariums, and nursing homes. The Nonprofit Institutions Act of 1938 exempts such sales to nonprofit institutions when such products are for the institution's "own use" . . .
>
> The third category of institutional purchaser would be private hospitals . . . which are operating for profit and hence not under the exemption of the Nonprofit Institutions Act. Although the Robinson-Patman Act applies to such sales, price differences are probably allowable to the same extent as with sales to nonprofit institutions. This is because sales for the profit institution's "own use" would not generally give rise to adverse competitive effects.

1967-68 Hearings 16.

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[16]Mr. Kintner furnished the Committee with the authority he relied on for that conclusion, *viz.*, "a discussion of the Robinson-Patman Act exemption accorded to governmental institutional purchasers" in Rowe, *Price Discrimination Under the Robinson-Patman Act*, 84-85 (1962) and *Sachs v. Brown-Forman Distillers Corp.*, 134 F. Supp. 9, 16 (S.D.N.Y. 1955), *aff'd*, 234 F.2d 959 (2d Cir. 1956). *1967-68 Hearings* 16 n. 1.

Mr. Kintner, having explained when discriminatory sales do *not* violate the Act, immediately turned to a discussion of discriminatory sales which do violate the Act:

> With this background, we can now focus on situations where the Robinson-Patman Act does apply, and where community pharmacies are subjected to competitive injury arising from preferred price concessions. This would minimally include the situation where institutional purchasers, *either profit or nonprofit*, secure favored price concessions from drug suppliers and then turn around and resell the drugs to private citizens who are nonpatients of the institution, and which are capable of shopping in the trading area and purchasing from the disfavored retail druggists.

Id. (Emphasis added). Mr. Kintner accordingly construed the Act as never applicable to governmental purchases, in contrast to purchases by private institutions which are subject to the Act if purchased for resale, and his interpretation was not challenged in any respect.

The practice of granting discounts to hospitals was discussed in detail by the witnesses,[17] including the Chairman of the FTC. Paul Rand Dixon, who stated:

> This agency, of course, does not have, nor does it seek, control or influence over State or Federal health care programs or their potential effect on private markets. It may be true that there is a degree of subsidization of drug manufacturers' low prices to Government through higher prices charged regular commercial

[17]In addition, the Committee obtained written responses from the drug manufacturers to detailed questions about pricing. Significantly, the questions treated sales to government separately from sales to other purchasers, including purchasers covered by the Non-profit Institutions Act, and thus indicate that the Committee recognized a distinction between governmental and non-governmental purchasers. Examples of such questions are set forth in Appendix B. While the questionnaire inquired about sales to non-governmental hospitals for their "own use", it made no comparable inquiry into sales to governmental hospitals for their "own use".

> channels . . . Whatever subsidization exists . . . is ultimately and primarily on the part of the drug-consuming public who also provide in large measure the tax revenues supporting Government health care programs. Were drug manufacturers' prices to Government and commercial channels required to be more proportionately balanced – so that prices to the drug-consuming public conceivably could be lowered – some of the savings to consumers might be lost to increased demand on tax revenues for the purpose of supporting the Government's higher cost.

1968 Report 74.

This disclaimer of any authority over transactions involving State health care programs by the FTC, which is entrusted with enforcement of the Act, is entitled to great weight. *Udall, supra,* 380 U.S. at 16.

The Committee concluded, *inter alia,* that the Nonprofit Institutions Act of 1938 "is designed to afford immunity to *private* nonprofit institutions . . . to the extent the sales are for the nonprofit institutions 'own use.'" (Emphasis added). 1968 Report at 68. The Committee also concluded that the Act should "be applied to discriminatory drug sales favoring *nongovernmental* institutional purchasers, profit or nonprofit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists." *Id.* at 79. (Emphasis added).

The Committee made several recommendations for further study, enforcement, and investigation, but conspicuously made no finding that governmental institutions were subject to the Act. The Committee's acceptance of the interpretation of the FTC and NARD respecting governmental purchases and its failure to recommend action to extend the Act to government institutions constitute compelling evidence of Congress' intent.

In 1969 and 1970, the same House Committee held hearings on the problems of small business, in which it heard again from the pharmaceutical industry, including NARD (*1969-70 Hearings* 27), as well as other industries. Again, witnesses told the Committee that state and local (as well as federal) governmental institutions receive price discounts, that there is competition between government and private business in the resale of commodities, and that the competition allegedly has an adverse competitive effect on small business. Again, it was explicitly recognized that additional legislation was needed to meet these complaints. *1969-70 Hearings* 73-77, 623. For example, the legal counsel to the Automotive Service Industry Association read a prepared statement which urged Congress to amend the Act to cover governmental purchases:

> In the view of many businessmen, an ironic twist is provided to the Robinson-Patman Act by the fact that the Government is constantly the recipient of favorable discriminatory prices, thereby violating its own principles. This results from the fact that, while the Act is silent on the subject, its legislative history and subsequent interpretation support the proposition that *sales made to Federal or State governmental bodies are not subject to the provisions of the Act.*
>
> *This may be injurious to competition in several ways.* First, there is the problem of injury to "first line" competition, where one seller engages in predatory price cutting to a buyer in order to destroy a competing seller.
>
> Second, *there are "second line" situations where competition exists between the Government and private industry in the resale of commodities.*
>
> Third, this practice injures the competition of wholesalers when their supplier decides to sell directly to a government at a discount, withdrawing the former use of wholesalers in the chain of distribution. . . .

> *The Federal Trade Commission has not recommended legislation to make the Robinson-Patman Act applicable to sales to governmental purchases. However, in our opinion Congress should consider acting on its own volition.*

1969-70 Hearings 623 (emphasis added).

During the same hearings, a representative of the National Association of Wholesalers testified:

> Over the years, the Robinson-Patman Act has not been extended to cover sales to the Government. In the days when government purchases constituted a relatively small volume in the market place, *this exemption* posed few problems. But today, with the vast growth in Government purchases, Federal, State, and local, which are estimated to be 25 percent of all goods produced, the continued exemption creates many unfair competitive situations.

1969-70 Hearings 73. (emphasis added).

In the face of interpretations by the witnesses at the hearings (including the FTC and NARD), the Act's cosponsor, the Attorney General and other authorities[18] that the Act does not apply to governmental purchases, the subsequent legislative history (including Congress' failure to

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[18]Over the years, other executive, administrative and legal authorities have interpreted the Act as not applicable to government. *See* Report of the Attorney General under Executive Order 10936, on Identical Bidding in Public Procurement (July 1962); Letter of the Comptroller General of the United States, 1973-2 Trade Cas. (CCH) ¶ 74,642 (July 17, 1973); Opinion of the Attorney General of Minnesota, 1952-59 Trade Cas. (CCH) ¶ 55,157 (March 4, 1957); Opinion of the Attorney General of Wisconsin, 26 Op. Att'y. Gen. 142 (April 18, 1957) cited in Trade Reg. Rep. (CCH) ¶ 8275; Opinion of the Attorney General of North Carolina, 1977-2 Trade Cas. (CCH) ¶ 61,797 (Nov. 15, 1977); Rowe, *Price Discrimination Under The Robinson-Patman Act*, 83-84 (1962); 3 Von Kalinowski, *Anti-Trust Laws and Trade Regulation*, § 24-06[2] (1978); 5A Cavitch, *Business Organizations*, § 105D-01[8][b,c]; *cf.* W. Patman, *Complete Guide To The Robinson-Patman Act* 30 (1963).

pass the proposed amendments to cover government) confirms that the Act was never intended to cover governmental purchases. *See FTC v. Ruberoid Co.*, 343 U.S. 470, 479 (1952); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199-20 (1974); *Flood v. Kuhn*, 467 U.S. 258 (1972); *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 351-52 (1941).

G. Without Exception, Courts Considering the Matter of Coverage Have Concluded that the Act Does Not Apply to Governmental Purchasers.

The judicial decisions considering the Act's application to purchases by government are few in number, but they represent an unbroken consensus upholding the exclusion. *Sachs v. Brown-Forman Distillers Corp.*, 134 F. Supp. 9 (S.D.N.Y. 1955), *aff'd per curiam on basis of district court opinion*, 234 F.2d 959 (2d Cir.), *cert. denied*, 352 U.S. 925 (1956); *General Shale Products Corp. v. Struck Const. Co.*, 37 F. Supp. 598 ((W.D. Ky.), *aff'a*, 132 F.2d 425 (6th Cir. 1942), *cert. denied*, 318 U.S. 780 (1943); *Portland Retail Druggists Ass'n. v. Abbott Laboratories*, No. 71-543 (D. Or. Sept. 11, 1972) (unpublished opinion), *vacated and remanded on other issue*, 510 F.2d 486 (9th Cir. 1974), *vacated and remanded on other issue*, 425 U.S. 1 (1976); *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 1974-1 Trade Cas. (CCH) ¶ 75,054 (D. Utah 1974); *Logan Lanes, Inc. v. Brunswick Corp.*, No. 4-66-5 (unpublished opinion, D. Idaho, May 26, 1966), *aff'd*, 378 F.2d 212 (9th Cir.) (affirmed on basis of 15 U.S.C. § 13c, without reaching sovereign immunity ground), *cert. denied*, 389 U.S. 898 (1967). These cases were discussed by the other respondents in their brief and we adopt that discussion. Abbott Br. pp. 26-28. There has not been one decision which imposed liability upon a seller or buyer, under either Section 2 (a) or 2 (f) of the Act, where either the dis-

criminatorily low or high price involved a sale to a State, city or county, or governmental agency or instrumentality.[19]

NARD argues that the decisions which involve purchases by a governmental body for its own consumption "are generally inapplicable." (NARD brief, p. 17). NARD's purported distinction is meaningless. Nothing in the Robinson-Patman Act distinguishes purchases (other than those by charitable institutions) for consumption from those for resale. The Act expressly applies to discriminations in prices between the purchasers of like commodities "where such commodities are sold for use, consumption, or resale." 15 U.S.C. § 13 (a). A price discrimination in favor of a purchaser who buys for its own use or consumption violates the Act no less than does a discrimination in favor of a purchaser who resells, provided there is injury to competition. Thus, in *Logan Lanes, supra*, the University did not resell the bowling equipment it purchased, but the lower price it paid gave it a competitive advantage over privately owned bowling alleys. Even if a favored purchaser does not compete at all, its receipt of a favorable price gives rise to a cause of action to the seller's competitors who are harmed by the transaction. Thus, there can be injury to both primary line and secondary line competition when a favored purchaser does not resell the commodity purchased. If government purchases were subject to the Act, therefore, the Act would apply regardless of the government's intended use of the goods. However, since government purchases in fact were not intended to be subject to the Act, the government's intended use of the goods purchased is likewise irrelevant.

[19]None of the cases cited by amicus NARD contradicts this statement or even hints that State institutions are prohibited from receiving favorable prices.

II.

APPLICATION OF THE ACT TO THE STATE OF ALABAMA WOULD PRESENT A SIGNIFICANT RISK OF CONFLICT WITH THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A construction of the Act that would subject the purchases here challenged to its proscriptions would raise serious questions under the United States Constitution. Because the courts below rejected a construction of the Act as applicable to government purchases, they did not need to decide this constitutional issue, although they expressly noted that the Tenth Amendment provides support for the conclusion that the Act does not reach such purchases.

This Court recently summarized the test of whether a statute conflicts with the Tenth Amendment. The test is met if the challenged statute (1) regulates the States as States, (2) addresses matters that are attributes of State sovereignty and (3) directly impairs the States' ability to structure integral operations in areas of traditional functions. *United Transportation Union v. Long Island R.R.*, ... U.S. ....., 71 L. Ed. 2d 547, 553 (1982), quoting from *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 69 L. Ed. 2d 1, 6 (1981) [explaining test enunciated in *Usery, supra*, 426 U.S. at 845, 852, 854].

If the Robinson-Patman Act were to be construed as applicable to States and State institutions, the first two prongs of the test of Constitutional conflict are automatically met.[20] The first prong, the regulation of States as States,

[20]Petitioner's brief does not mention the Tenth Amendment, while the NARD brief focuses principally upon the third prong of the test, denying that it is met here. NARD brief p. 21-23. NARD impliedly concedes that application of the Act to Alabama satisfies the test's first element, by its statement: "Regulation of the respondent pharmaceutical companies

includes the regulation of State institutions and State subdivisions, including counties, since they "derive their authority and power from their respective states" and they provide "integral governmental services" within the ambit of the Tenth Amendment. *Usery*, 426 U.S. at 855 n.20. This factor distinguishes the recent case of *Hodel, supra*, where the challenged statute regulated private industry and did not compel the States to take any action, to expend any State funds, or to participate in the federal regulatory program in any manner.

If the Robinson-Patman Act purports to interfere with the relationships between a State and its suppliers by removing the State's freedom to negotiate prices below prevailing trade levels for goods purchased, then the Act regulates an attribute of State sovereignty to no less an extent than did the Fair Labor Standards Act when it attempted to interfere with the State's relationship with its employees by taking away the State's freedom to compensate its employees less generously than does private industry. *Usery, supra*.

A State is a political institution that promulgates, within its political boundaries, rules and regulations for the good of all citizens, enforces those regulations, and provides various services for the general welfare and benefit of its citizens. Since these characteristics of a State (lawmaking, law enforcing, and providing services) are necessarily carried out by elected officials and State employees, the control of State employees is understandably an attribute of State sovereignty, *Usery, supra* at 845. Similarly, since a State's execution of its functions depends upon the expenditure of

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and respondent Cooper Green Hospital is clearly not regulation of the 'States as States.'" NARD brief p. 22 (footnote omitted). We do not agree, however, with NARD's denial that the Act's application to respondent, Cooper Green Hospital, would satisfy the first element of the test.

State funds to purchase various goods, the attributes of State sovereignty necessarily include appropriation of State funds, the State's purchase of goods, and the State's disposition of those goods. Each of these attributes is affected when the price the State pays for the goods, and the price at which it resells goods, is subject to federal control. The real question presented here, then, is whether application of the Robinson-Patman Act to Alabama presents a significant risk that the third element of the test of conflict with the Tenth Amendment is met.

A. Application of the Robinson-Patman Act to the State would Pervasively Affect *All* of the Traditional Functions of the State, Thus Impairing Its Ability to Structure Integral Operations and Deliver Services to Its Citizens.

Application of the Robinson-Patman Act to State government, including Alabama here, would impair the States' ability "to structure integral operations in areas of traditional functions." *Id.* at 852. The Act impacts upon *every* function of State government, including its most traditional functions, because the Act constitutes an across-the-board regulation of purchasing, is not limited to any type of goods, type of supplier, or specific industry, and is expressly applicable to all purchases, whether for resale, use, or consumption. In this respect, the Robinson-Patman Act is indistinguishable from the Fair Labor Standards Act. Application of these Acts to the States and their subdivisions would affect traditional State and local functions such as education, law enforcement, fire protection, prisons, parks, health care for the needy, housing, and the administration of the State's laws. Even were the Court to construe the Non-Profit Institution Act as providing an exemption for governmental hospitals and universities, all of the State's

purchases for its many functions not mentioned by that Act, including fire and police protection, State office buildings, prisons, sewage treatment plants, etc., would be subject to the Act even though the goods purchased are "consumed" by the State, and not resold.[22]

This Court expressly recognized in *Usery* that "schools and hospitals . . . and . . . fire and police departments . . . each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." 426 U.S. at 855. *Cf. Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (education is an integral State function over which federal courts have no control unless a State's educational operations "directly and sharply implicate basic constitutional values").

Since the Act's application to Alabama's medical school or to other State operations would affect traditional governmental functions, the real thrust of the inquiry here must be an examination of *how* the Act *impairs* the ability of Alabama to carry out its traditional functions. As stated, the Act would affect all State operations which purchase goods, regardless of the disposition of the goods. Thus, State purchases for consumption, whether the goods are office supplies and office furniture for State employees; books and equipment for State schools; canoes, picnic tables, and shrubbery for State parks; bullet proof vests, firearms and patrol cars for law enforcement officers; airplanes for State officers; mattresses or food for state prisons; windows for State housing projects; or equipment and drugs

[22]Consider the typical state-run cafeteria in a State office building. Members of the public and even employees dining in such a cafeteria would subject the State, under the petitioner's theory, to Robinson-Patman liability. There would be no "own use" exemption for such a cafeteria under the charitable exemption, because the exemption would not, in its terms, apply. The result of petitioner's illogic would thus deprive the State of the efficiency and fringe benefits conferred by an in-building cafeteria.

for State hospitals and other State health care facilities, would be subject to the Act. Since a favorable price could cause competitive injury at the primary line of competition,[23] the State would be a potential defendant in a case brought by a competitor of the State's supplier *every time the State purchases goods for its many functions*, even where the goods are purchased for the State's "own use."

The State would be a potential defendant in a primary or secondary line competition case when it purchases goods to be resold, such as notebooks and other articles to be sold in its university bookstores; food to be sold in its cafeterias located in State parks, office buildings or universities; or, as alleged here, pharmaceuticals to be sold in State health care facilities. Likewise, when the State sells its used goods (such as automobiles) which it purchased at favorable prices, the State "competes" with sellers of used goods (such as car-rental companies and used car dealers) and is, again, a potential defendant in a secondary, as well as primary, line competition case.

Moreover, if the goods purchased by the State are not resold but are used in connection with services open or provided to the public, such as a diving board used in a State park or school swimming pool which is used by members of the public who might otherwise be customers of a private athletic club, or materials used in housing projects occupied by tenants who would otherwise rent private housing, then the State would be a potential defendant as a favored buyer in a secondary, as well as a primary, line competition case.

In all these ways, the Act would treat States like private businesses and prevent them from securing favorable dis-

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[23] *See, e.g., Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696 (1967) ("Sellers may not sell like goods to different purchasers at different prices if the result may be to injure competition in either *the seller's* or the buyers' *market* . . .") (emphasis added).

counts. Higher prices for government in these and other governmental operations would unquestionably translate into a combination of fewer governmental services and higher taxes. Because the Act would apply to *every* governmental operation, the State's increased cost caused by purchasing at prevailing trade level prices would be enormous. It was just such an impact on governmental services which led this Court to strike down the Fair Labor Standards Act amendments in *Usery*, 426 U.S. 846-47, and which, we contend, motivated Congress' intent in 1936 that government was not covered by the Robinson-Patman Act.

The breadth of the Robinson-Patman Act, and its application to every operation of State government that makes purchases or sales of goods, distinguishes it from the statute upheld in *Long Island R.R., supra.* The Railway Labor Act, 45 U.S.C. § 151 *et seq.*, considered in *Long Island R.R.*, applies to a specific industry, railroads, which is *not* a traditional State operation. 71 L. Ed. 2d at 553. To the contrary, railroads have been subject to comprehensive federal regulation for nearly a century. *Id.*, at 555. This Court noted that to allow States "by acquiring railroads to circumvent the federal system of railroad bargaining, or any of the other elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system." *Id.* at 556. Finally, this Court noted that "a State acquiring a railroad does so knowing that the railroad is subject to this longstanding and comprehensive scheme of federal regulation of its operations and its labor relations." *Id.* The State of New York had in fact acquired the Long Island railroad "with full awareness that it was subject" to the Railway Labor Act, and the State had operated under federal regulation "for 13 years without claiming any impairment of its traditional sovereignty." *Id.* at 556-57.

Because the Robinson-Patman Act, if it applies to States at all, applies to every State operation (precisely as did the Fair Labor Standards Act), it can hardly be said that the Act regulates an aspect of interstate commerce which has been subject to comprehensive and longtime federal regulation, as was true in *Long Island R.R.* Alabama, unlike New York there, has not entered a field subject to federal regulation, nor has it been operating pursuant to a federal regulatory scheme without impairment. The Robinson-Patman Act, as applied to State purchases, is markedly different from the Railway Labor Act because it burdens States operations *as a whole*.

B. Application of the Robinson-Patman Act to the State Would Give Rise to a Serious Risk That the State's Structuring of its University Hospital and Health Care Facilities Would Be Impaired.

Because the Robinson-Patman Act does not specifically regulate pharmaceutical sales, but more broadly affects sales and purchases of any commodity, the Act's validity would be undermined by its burden on State operations generally, and does not depend upon whether its application to the State's university and hospitals would directly displace Alabama's freedom to structure integral operations in the areas of education or health care. Yet application of the Act to such State operations would in fact interfere with Alabama's freedom to structure its educational and health care systems.

As discussed earlier, Alabama unquestionably operates traditional governmental functions, *i.e.*, a university medical center. Application of the Act to Alabama's hospital pharmacies would displace the State's discretion "regarding the *manner* in which [it] will structure delivery of those governmental services." *Usery*, 426 U.S. at 847 (em-

phasis added). A State's right to deliver traditional governmental services, such as education and health care, necessarily includes its right to structure the means for delivery of those services. *Id.* The University's hospital pharmacies are in fact integral components of the University health care facilities.

Petitioner and the amici curiae apparently do not deny that a State's purchase of pharmaceuticals for the treatment of in-patients is an indispensable part of operating a hospital. Yet, if the Robinson-Patman Act were to apply to Alabama, then it would affect the price of pharmaceuticals purchased for *in-patient use* (unless the exemption provided under 15 U.S.C. § 13c were somehow construed to apply). Since the operation of a hospital, especially a teaching hospital, is a proper State function, then the dispensing of drugs to its in-patients is surely a State function which would be unreasonably impeded if the cost of those drugs were determined by the prices paid by drug stores and hospitals which operate for profit.

Assuming that the Act applies to *all* pharmaceutical purchases by Alabama, it would impose a heavier burden upon Alabama than it does upon private, non-profit hospitals, as their purchases for their "own use" are exempt, and it would also disadvantage Alabama more than private, for-profit hospitals, since by definition such hospitals earn profits and, unlike a State, or its university or hospital, they structure their operations with profits in mind. A State, however, must be free to structure its educational and health care programs without regard to profitability of such operations, since a profit-orientation would cause the State to discontinue services which are very worthy (*e.g.*, medical research, or free health care for the needy), but unprofitable. While Alabama could simply pass the price increases on to its patients, such a consequence would

displace the State's power to assure the availability of its health care services to all of its citizens, including those with limited ability to pay. Thus, application of the Act to Alabama would interfere with the State's decisions regarding the manner in which it structures the delivery of medical education and health care.

The same consequences would follow if Alabama were required to purchase at trade level prices if, as alleged, it resells pharmaceuticals to persons who are not patients. Even if Alabama were treated as a non-profit hospital under 15 U.S.C. § 13c, the Act would severely restrict its operations. In such a case, the Act would dictate Alabama's manner of structuring its hospital care by limiting its choices to two alternatives, namely, not to dispense drugs for resale, or to develop an accounting, inventory, and documentation system that would enable Alabama to purchase drugs at different prices, according to the drugs' ultimate disposition.

The burden and increased costs of establishing such a system to assure compliance with this Court's ruling in *Abbott Laboratories v. Portland Retail Druggists Association, Inc.*, 425 U.S. 1 (1976), cannot be discounted. *See* Rosoff & Dunfee, *A "Fix" For the Retail Pharmacy: The Supreme Court Redefines Application of the Robinson-Patman Act to Drug Sales by Nonprofit Hospitals*, 13 CALIF. W. L. REV. 195, 220, 227-28 (1977) [hereinafter referred to as "Rosoff & Dunfee"]. Alabama could minimize these increased costs by not dispensing drugs in any mode held to be outside the section 13c exemption. In such a case, the Act would directly supplant the state's decision that proper medical care entails the availability of pharmaceuticals to all persons, regardless of whether they are treated at the hospital.[24]

[24]Moreover, this Court's decision in *Abbott Laboratories* leaves unresolved significant questions about the definition of "out-patients,"

State hospitals wishing to purchase at the lowest possible price but also wishing to make refills available to former patients, patients of university faculty physicians, and walk-ins simply cannot accomplish both objectives if they must comply with the Robinson-Patman Act. While Congress may legitimately decide that pharmaceutical prices paid by private, non-profit hospitals should depend upon the use made of the pharmaceuticals, it cannot make that decision for State hospitals without creating a serious risk of conflicting with the Tenth Amendment by displacing the State's decision as to how it should make health care available to its citizens. Congress has not made such a decision.

Alabama and other States may also make the decision that compensation of State employees outside the hospitals should include the privilege of obtaining their drugs at favorable prices. Yet drugs used by a maintenance or other employee not on the medical staff may not be for Alabama's "own use." *See Abbott Laboratories*, 425 U.S. at 16. By applying the Robinson-Patman Act to Alabama, Congress would have significantly discouraged Alabama from compensating its employees in this form, because the University would incur a higher cost for the drugs, in addition to the administrative costs involved. Thus, the Act would affect Alabama's employment decisions in the same way that

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whose purchases fall within the 15c exemption. Rosoff & Dunfee, 215-15. According to this Court's definition in *Abbott Laboratories*, a person is not an outpatient unless he "receives treatment or consultation on the premises" 425 U.S. 1, 9. Does a patient's treatment at an ambulatory clinic or the private office of a university doctor, both of which may be physically separated from the hospital premises though perhaps connected to or near the hospital, disqualify such a patient from filling his prescriptions at the hospital pharmacies if the hospital obtained the drugs at favorable prices? If an ambulatory clinic patient returns to the clinic pharmacy for refills because he wishes to use the drug at the clinic premises, where supervision and care is available if necessary, does the price he pays depend upon whether treatment becomes necessary before he leaves?

the Fair Labor Standards Act invalidly restricted such decisions in *Usery*. Congress did not make such a decision when it enacted the Act.

Again, the State may choose to purchase pharmaceuticals at favorable prices in order to pass the savings on to the students of the university or to people who cannot afford to pay for drugs at the retail price. Application by this Court of the Act to a State could discourage such programs, and displace the State's decision to provide low cost medical care for students and the poor.

Alabama has already determined that it will seek "the lowest possible price" for its pharmaceuticals and other goods by buying via sealed competitive bidding when the purchase involves at least $2000.[55] §§ 41-16-20, -21 (b), Ala. Code (Supp. 1981); *White v. McDonald Ford Tractor*, 287 Ala. 77, 88, 248 So. 2d 121, 129 (1971). If Alabama were required to purchase at trade level prices, it could still engage in competitive bidding, but the bidding suppliers would have to bid at their list prices. Certainly sealed competitive bidding contemplates that bids will be lower than list prices;[56] otherwise the State would solicit price lists of competing suppliers and buy from the supplier with the lowest list price. Yet State law does not allow purchases in this manner, unless the purchase price falls below $2000. As one writer stated:

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[55]Prior to 1976, the competitive bidding laws applied to all purchases above $500. §§ 41-16-10, -21 (b), *Code of Alabama* (1975) Many of the purchases involved in this action were made prior to 1976, since the Complaint, filed August 7, 1978, covers "a period commencing four years next preceding the filing of" the Complaint. (J. A. 1a, 7a). Before and after 1976, the statutes required that state purchases above the minimum amount "be let by free and open competitive bidding on sealed bids to the lowest responsible bidder." Ala. Code §§ 41-16-20, -21 (b), (1975) (Supp. 1981).

[56]At the *1967-68 Hearings*, Congress in fact was told that competitive bids submitted to governmental institutions do not necessarily correspond to the bidders' retail prices. *See, e.g., 1967-68 Hearings* at A-75, 76-77.

> It is perforce the very nature of the competitive bidding process which encourages discriminatory price reductions. Sellers are virtually forced to offer the lowest price feasible. This situation is arguably a breeding ground for discriminatory prices . . . [T]his downward pressure distinguishes competitive bidding, in all its forms, from a mere request for a price quote. In the latter instance, apart from the ever-present need to fall within a competitive range, the pressure to shave prices is considerably less.
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> . . . But bidding by its nature demands price discrimination. The seller is asked to give his lowest possible price, not his usual list price . . .

Competitive Bidding Under the Robinson-Patman Act, 49 ST. JOHN L. REV. 512, 526, 540 (1975). A successful bidder who bids below list price cannot generally justify the price cut on the basis of meeting competition, "since the object of bidding is to 'beat' and not merely to 'meet' the competition" and he presumably must beat all competition to obtain the contract. *Id.* at 512. Where, as in Alabama, the contract may be awarded to a supplier whose bid does not "beat" all other bidders' prices because the lowest priced bidder was not "responsible", successful sellers whose bids do not *beat* the competition are deprived of the meeting competition defense because the bids are sealed, so their price discriminations are not made in response to competitors' bids. Accordingly, the Robinson-Patman Act would override this decision by Alabama that it should induce its suppliers to sell at favorable prices.

Whether the Robinson-Patman Act is construed as applying to all State purchases, or to all State purchases except purchases by State hospitals, schools and libraries for their "own use," such a construction affects every tradi-

tional governmental function and its integral operations. Even if the exemption afforded by 15 U.S.C. § 15c were construed to apply to Alabama, the Act's application to the non-exempt purchases (*e.g.*, pharmaceuticals used for refills, compensation to personnel who are not on the medical staff, walk-ins; or goods purchased for prisons, parks, offices, and other functions not within Section 13c) could cause Alabama to reduce or restructure its services in ways contrary to how it has decided those services should be structured. Congressional interference with State functions of this magnitude raises serious constitutional problems and could hardly have been intended by Congress in passing the Act.

CONCLUSION

The decision of the Fifth Circuit Court of Appeals in this case is supported by compelling evidence of Congressional intent that the Robinson-Patman Act not bind or restrict government (federal, State or local). That evidence includes Congress' later refusals to extend the Act to cover governmental purchases, despite claims made at Congressional hearings that the governmental exclusion caused competitive injury to some businesses. Congress' intent has been correctly recognized by the many authorities which have construed the Act as not covering governmental purchasers. Alabama and its suppliers have relied upon this longstanding interpretation of non-coverage for over four decades, and Congress has actively acquiesced in it.

To extend the Act to Alabama would not only defeat the intention of Congress, but it would also risk impairing the State's ability to structure its integral operations for every function and service it provides. This is a result which Congress never contemplated.

For these reasons, Alabama respectfully urges that the decision below be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

Hearings and Congressional Reports Relating to the Robinson-Patman Act

Hearings Before the Senate Select Committee on Small Business to Consider the Report of the Attorney General's National Committee to Study the Antitrust Laws, 84th Cong., 1st Sess. (1955) [referred to in text as *1955 Hearings*]

Hearings Before the Antitrust Subcommittee of the House Judiciay Committee on Bills to Amend Sections 2 and 3 of the Clayton Act, 84th Cong., 2d Sess. (1956)

H.R. Rep. No. 2966, 84th Cong., 2d Sess. (1956); S. Rep. No. 2817, 84th Cong., 2d Sess. (1956)

Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on Bills to Amend Section 2 of the Clayton Act, 85th Cong., 1st Sess. (1957)

Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business, on Small Business Problems in the Drug Industry, 90th Cong. (1967-68) [referred to in text as *1967-68 Hearings*]

H.R. Rep. 1983, Report of Subcommittee No. 5 to the Select Committee on Small Business, House of Representatives, 90th Cong., 2d Sess. (Dec. 31, 1968) [referred to in text as 1968 Report]

Hearings Before the Special Subcommittee on Small Business and Robinson-Patman Act of the Select Committee on Small Business, 91st Cong., 1st and 2d Sess. (1969-70) [referred to in text as *1969-70 Hearings*]

Hearings on Recent Efforts to Amend or Repeal the Robinson-Patman Act Before the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters of the Committee on Small Business, 94th Cong., 1st & 2d Sess. (1975-76)

Bills Introduced to Amend the Robinson-Patman Act and Related Sections of the Clayton Act

H.R. 2475, 80th Cong., 1st Sess., (1947) To amend Clanton Act by adding proviso to Section 2(e) of said act (U.S.C., Title 15, Sec. 13(e)).

S. 719, 82nd Cong., 1st Sess. (1951) To establish beyond doubt that, under the Robinson-Patman Act., it is a complete defense to a charge of price discrimination for the seller to show that its price differential has been made in good faith to meet the equally low price of a competitor.

H.R. 3408, 82nd Cong., 1st Sess. (1951) To amend the Clayton Act by granting a right of action to the United States to recover damages under the antitrust laws, establishing a uniform statute of limitations and for other purposes.

H.R. 4452, 82nd Cong., 1st Sess. (1951) To amend Section 2 of the Clayton Act so as to make it applicable to discriminatory sales to the United States and to any state or political subdivision thereof.

H.R. 3377, 83rd Cong., 1st Sess. (1953) To amend Section 2 of the Clayton Act so as to make it applicable to discriminatory sales to the United States and to any state or political subdivision thereof.

S. 1357, 83rd Cong., 1st Sess. (1953) To strengthen the Robinson-Patman Anti-Price Discrimination Act and the protection which it affords to small and independent business.

S. 1377, 83rd Cong., 1st Sess. (1953) to define the application of the Clayton and Federal Trade Commission Acts to certain pricing practices.

S. 2604, 83rd Cong., 2nd Sess. (1954) To relieve independent distributors from restrictions on their freedom to compete imposed by Section 2(c) of the Robinson-Patman Act. (H.R. 7198)

H.R. 11, 84th Cong., 1st Sess. (1955) Declaration of purpose and policy to reaffirm the national public policy and the purpose of Congress in the laws against unlawful restraints and monopolies, commonly designated "Antitrust Laws", which among other things prohibit price discriminations; to aid in intelligent, fair, and effective administration and enforcement thereof; and to strengthen the Robinson-Patman Anti-Price Discrimination Act and the protection which it affords to independent business, the Congress hereby reaffirms that the purpose of the antitrust laws in prohibiting price discriminations is to secure equality of opportunity of all persons to compete in trade or business and to preserve competition where it exists, to restore it where it is destroyed, and to permit it to spring up in new fields. (H.R. 2611, 2850) [introduced to override *Standard Oil of Indiana v. FTC*, 340 U.S. 231 (1950)]

S. 733, 84th Cong., 1st Sess. (1955) To amend the Clayton Act by granting a right of action to the United States to recover damages under the antitrust laws. (H.R. 3658, 4584)

S. 11, 84th Cong., 1st Sess. (1955) To amend the Robinson-Patman Act in reference to equality of opportunity. [Same as H.R. 11, *supra*]

H.R. 1840, 84th Cong., 1st Sess. (1955) To strengthen the Robinson-Patman Act and amend the antitrust law prohibiting price discrimination. (H.R. 2690)

H.R. 2577, 84th Cong., 1st Sess. (1955) To amend Section 2 of an act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," to strengthen the protection which it affords to independent business in prohibiting price discrimination.

H.R. 4954, 84th Cong., 1st Sess. (1955) To amend the Clayton Act by granting a right of action to the United States to recover damages under the antitrust laws, establishing a uniform statute of limitations and for other purposes. (H.R. 4958)

H.R. 6875, 84th Cong., 1st Sess. (1955) To amend the Clayton Act to allow the courts discretion in awarding damages and for other purposes.

H.R. 7096, 84th Cong., 1st Sess. (1955) For freedom of choice in trade—to amend Sections 3 and 4 of the Clayton Act to free those in commerce from restraints of trade and to allow small-business men freedom of choice in conduct of their respective businesses as independent enterprises.

H.R. 5213, 84th Cong., 1st Sess. (1955) To amend the act of October 15, 1914, commonly known as the Robinson-Patman Act, to make it applicable to sales of commodities made to governmental agencies for resale.

S. 780, 84th Cong., 1st Sess. (1955) To define the application of the Clayton and Federal Trade Commission Acts to certain pricing practices.

H.R. 3949, 84th Cong., 1st Sess. (1955) To define the application of the Clayton and Federal Trade Commission Acts to certain pricing practices.

H.R. 11846, 84th Cong., 2nd Sess. (1956) To amend Section 3 of the Clayton Act to free those in commerce from restraints of trade and to allow small-business men freedom of choice in the conduct of their respective businesses as independent enterprises.

H.R. 722, 85th Cong., 1st Sess. (1957) To amend the act of October 15, 1914, commonly known as the Robinson-Patman Act, to make it applicable to sales of commodities made in governmental agencies for resale.

S. 3079, 85th Cong., 2nd Sess. (1958) To amend the Clayton Act to permit the institution of actions for damages for violations of the Robinson-Patman Act and for other purposes. (H.R. 10243, 10251, 13357)

S. 3654, 85th Cong., 2nd Sess. (1958) To reaffirm the national public policy and the purposes of Congress in enacting the

Robinson-Patman Anti-Price Discrimination Act entitled "An act to amend Section 2 of the act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U.S.C., Title 15, Sec. 13), and for other purposes," and to clarify the intent and meaning of the aforesaid law by providing for the mandatory nature of functional discounts under certain circumstances. (H.R. 10304, 10305)

S. 3852, 85th Cong., 2nd Sess. (1958) To amend the Clayton Act to prohibit sales in commerce at unreasonably low prices where the effect may be to injure competition.

S. 11, 85th Cong., 2nd Sess. (1958) To amend the Robinson-Patman Act with reference to equality of opportunity.

H.R. 155, 86th Cong., 1st Sess. (1959) To amend the act of October 15, 1914, commonly known as the Robinson-Patman Act, to make it applicable to sales of commodities made to governmental agencies for resale.

H.R. 430, 87th Cong., 1st Sess. (1961) To amend the act of October 15, 1914, commonly known as the Robinson-Patman Act, to make it applicable to sales of commodities made to governmental agencies for resale.

S. 11, 86th Cong., 1st Sess. (1959) To amend the Clayton Act as amended by the Robinson-Patman Act with reference to equality of opportunity.

S. 315, 86th Cong., 1st Sess. (1959) To reaffirm the national public policy and the purposes of Congress in enacting the Robinson-Patman Anti-Price Discrimination Act entitled "An act to amend Section 2 of the act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U.S.C., Title 15, Sec. 13), and for other purposes," and to clarify the intent and meaning of the aforesaid law by providing for the mandatory nature of functional discounts under certain circumstances. (H.R. 11, 848, 927, 929, 1205, 2528, 2788, 2868, 4530)

S. 725, 86th Cong., 1st Sess. (1959) To amend the Clayton Act to permit the institution of actions for damages for violations of the Robinson-Patman Act and for other purposes.

H.R. 190, 87th Cong., 1st Sess. (1961) To amend the Clayton Act to allow courts discretion in awarding damages.

H.R. 72, 87th Cong., 1st Sess. (1961) To amend the Clayton Act as amended to establish standards for the organization and operation of government advisory groups.

S. 2254, 87th Cong., 1st Sess. (1961) To amend the Clayton Act as amended to supplement the antitrust laws with respect to the liability of the directors, officers, and agents of a corporation to increase the penalties for violations of the antitrust laws and for other purposes. (H.R. 8138)

S. 11, 87th Cong., 1st Sess. (1961) To amend the Clayton Act as amended by the Robinson-Patman Act with reference to equality of opportunity.

H.R. 136, 87th Cong., 1st Sess. (1961) To reaffirm the national public policy and the purpose of Congress in the laws against unlawful restraints and monopolies, commonly designated "Antitrust Laws" which among other things prohibit price discriminations; to aid in intelligent, fair, and effective administration and enforcement thereof; and to strengthen the Robinson-Patman Anti-Price Discrimination Act and the protection which it affords to independent business, the Congress hereby reaffirms that the purpose of the antitrust laws in prohibiting price discrimination is to secure equality of opportunity of all persons to compete in trade or business and to preserve competition where it exists, to restore it where it is destroyed, and to permit it to spring up in new fields. (H.R. 11, 442, 597, 3465, 4151, 4529)

H.R. 12032, 87th Cong., 2nd Sess. (1962) To aid enforcement of the Clayton Act.

S. 3255, 87th Cong., 2nd Sess. (1962) To amend the Robinson-Patman Act relative to functional discounts.

H.R. 10536, 87th Cong., 2nd Sess. (1962) To amend the Clayton Act so as to permit civil actions for treble damages in the case of violation of Section 3 of the Robinson-Patman Act.

S. 3255, 87th Cong., 2nd Sess. (1962) To reaffirm the national public policy and the purposes of Congress in enacting the Robinson-Patman Anti-Price Discrimination Act entitled "An act to amend Section 2 of the act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes,' approved October 15, 1914, as amended (U.S.C., Title 15, Sec. 13), and for other purposes," and to clarify the intent and meaning of the aforesaid law by providing for the mandatory nature of functional discounts under certain circumstances.

H.R. 3786, 88th Cong., 1st Sess. (1963) To amend the Clayton Act as amended to strengthen our competitive enterprise system by providing for competitive acts practices and methods of competition and for other purposes.

H.R. 3787, 88th Cong., 1st Sess. (1963) To amend the Clayton Act to declare private antitrust suits to be impressed with a substantial public interest.

S. 11, 88th Cong., 1st Sess. (1963) To amend the Clayton Act as amended by the Robinson-Patman Act with reference to equality of opportunity.

H.R. 8253, 88th Cong., 1st Sess. (1963) To amend Section 5 of the Clayton Act to strengthen the enforcement of the antitrust laws by private suits.

H.R. 11, 88th Cong., 1st Sess. (1963) (Declaration of Purpose and Policy) To reaffirm the national public policy and the purpose of Congress in the laws against unlawful restraints and monopolies, commonly designated "Antitrust Laws," which among other things prohibit price discrimination; to aid in intelligent, fair, and effective administration and enforcement thereof; and to strengthen the Clayton Act

as amended by the Robinson-Patman Act and the protection which it affords to independent business, the Congress hereby reaffirms that the purpose of the antitrust laws in prohibiting price discriminations is to secure equality of opportunity to all persons to compete in trade or business and to preserve competition where it exists, to restore it where it is destroyed, and to permit it to spring up in new fields.

S. 1815, 88th Cong., 1st Sess. (1963) To amend the Clayton Act to provide relief by governmental and private civil procedure for violation of Section 3 of the Robinson-Patman Act and for other purposes.

S. 1935, 88th Cong., 1st Sess. (1963) To amend the Clayton Act by making Section 3 of the Robinson-Patman Act a part of the Clayton Act in order to provide for governmental and private civil proceedings for violations of Section 3 of the Robinson-Patman Act. (H.R. 8833, 9195)

H.R. 9746, 88th Cong., 2nd Sess. (1964) To make Section 3 of the Robinson-Patman Act a part of the Clayton Act.

S. 995, 89th Cong., 1st Sess. (1965) To amend the Clayton Act by making Section 3 of the Robinson-Patman Act, with amendments, a part of the Clayton Act, in order to provide for governmental and private civil proceedings for violations of Section 3 of the Robinson-Patman Act. (H.R. 10112, 6393)

S. 2512, 89th Cong., 1st Sess. (1965) To amend Section 5(a) of the Clayton Act with respect to the evidentiary effect of judgments and decrees entered in proceedings instituted by the United States under the antitrust laws.

H.R. 48, 89th Cong., 1st Sess. (1965) To amend the Clayton Act as amended, to strengthen our competitive enterprise system by providing for competitive acts, practices and methods of competition and for other purposes.

H.R. 849, 89th Cong., 1st Sess. (1965) To amend the Clayton Act to declare private antitrust suits to be impressed with a substantial public interest.

H.R. 12319, 89th Cong., 2nd Sess. (1966) To amend Section 4 of the Clayton Act (15 U.S.C. 15) and for other purposes. (H.R. 12683, 12684, 14807)

H.R. 14045, 89th Cong., 2nd Sess. (1966) To amend the Clayton Act by making Section 3 of the Robinson-Patman Act, with amendments, a part of the Clayton Act, in order to provide for governmental and private civil proceedings for violations of Section 3 of the Robinson-Patman Act. (H.R. 14150)

H.R. 14079, 89th Cong., 2nd Sess. (1966) To amend the Clayton Act to prohibit vertically integrated companies from engaging in discriminatory practices against independent producers and distributors. (H.R. 14080)

S. 877, 90th Cong., 1st Sess. (1967) To amend the Clayton Act by making Section 3 of the Robinson-Patman Act, with amendments, a part of the Clayton Act, in order to provide for governmental and private civil proceedings for violations of Section 3 of the Robinson-Patman Act. (H.R. 6922, 9048, 9851)

H.R. 937, 90th Cong., 1st Sess. (1967) To amend the Clayton Act to declare private antitrust suits to be impressed with a substantial public interest.

H.R. 2514, 90th Cong., 1st Sess. (1967) To amend Section 4 of the Clayton Act (15 U.S.C. 15) and for other purposes. (H.R. 3083, 6844)

S. 1494, 91st Cong., 1st Sess. (1969) To amend the Clayton Act by making Section 3 of the Robinson-Patman Act, with amendments, a part of the Clayton Act, in order to provide for governmental and private civil proceedings for violations of Section 3 of the Robinson-Patman Act. (H.R. 13969)

H.R. 2170, 91st Cong., 1st Sess. (1969) To amend Section 4 of the Clayton Act (15 U.S.C. 15) and for other purposes.

H.R. 5839, 91st Cong., 1st Sess. (1969) To amend the Clayton Act as amended, to strengthen our competitive enterprise

system by providing for competitive acts, practices and methods of competition, and for other purposes.

H.R. 13654, 92nd Cong., 2nd Sess. (1972) To amend the Clayton Act by adding a new section to prohibit sales below costs for the purpose of destroying competition or eliminating a competitor.

S. 780, 93rd Cong., 1st Sess. (1973) To amend the Clayton Act by adding a new section to prohibit sales below costs for the purpose of destroying competition or eliminating a competitor. (H.R. 2384, 2451)

H.R. 2451, 93rd Cong., 1st Sess. (1973) To amend Section 4 of the Clayton Act (15 U.S.C. 15) and for other purposes.

H.R. 8532, 94th Cong., 1st Sess. (1975) To amend the Clayton Act to permit State Attorneys General to bring certain antitrust action and for other purposes.

H.R. 15550, 94th Cong., 2nd Sess. (1976) To amend Section 2 of the Clayton Act to prevent discriminatory pricing practices by suppliers of competing marketers. (15834)

H.R. 7647, 95th Cong., 1st Sess. (1977) To amend the Clayton Act to aid the private enforcement of the antitrust laws, by extending the common law of collateral estoppel to litigated antitrust judgment.

H.R. 7788, 95th Cong., 1st Sess. (1977) To amend the Clayton Act to provide that the existence of a contract or agreement between the person alleged to be injured and the defendant need not be proven in order for the person to recover in an action for treble damages under the act.

Reports by the Department of Justice

Report of the Attorney General's National Committee to Study the Antitrust Laws (1955)

Report of the United States Department of Justice on the Robinson-Patman Act (1976)

Remarks in Congress
Pertaining to the Robinson-Patman Act

Remarks in House. Relative to bill (H.R. 2734) to amend Clayton Act. 81st Cong., 1st Sess., 95 Cong. Rec. 11,484 (1949).

Remarks in House. Robinson-Patman Act: provisions of Kefauver-Patman bill to amend (H.R. 11). 84th Cong., 1st Sess., 101 Cong. Rec. 128 (1955).

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Remarks in Senate. Robinson-Patman Act: provisions of bill (S. 780), amend. 93d Cong., 1st Sess., 119 Cong. Rec. 3,448 (1973).

APPENDIX B

(excerpts from questionnaire utilized at *1967-68 Hearings*)

5. Now, of your $ . . . annual U.S. sales of prescription drugs, approximately how would you break this down, percentagewise, between sales to these four categories:

a. Drug wholesalers
b. Retail pharmacists on a direct basis
c. Federal, state, or local governments
d. Non-profit non-governmental institutional purchases

6. Please tell us, in general percentages for example, how your prices on prescription drugs vary among these four broad categories:

16. I presume that your corporation has a pretty good idea of the prospective sales volume which is likely to be generated by *non-governmental hospitals for their own use*, is that correct?

18. So where a *non-governmental hospital* of a given bed size makes purchases of one of your pharmaceuticals, your company can, at some point in the volume of purchases, arrive at a pretty good judgment as to whether these purchases are *confined to their own use*?

20. What does your company do when information comes to your corporate attention that a *non-governmental institution* buying at a lower price than retail druggists in the area is actually *reselling the drugs* in direct competition with retail druggists in the area? [*1967-68 Hearings* 570-73, 697-98 (emphasis added)].

Petitioner's Reply Brief

No. 81-827

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FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.,

Petitioner,

v.

ABBOTT LABORATORIES, A CORPORATION; CIBA-GEIGY CORPORATION, A CORPORATION, D/B/A CIBA PHARMACEUTICAL COMPANY; AMERICAN CYANAMID CO., A CORPORATION, D/B/A LEDERLE & LABS. DIVISION; PARKE-DAVIS & CO., A CORPORATION; CHARLES PFIZER & CO., INC., A CORPORATION, FORMERLY KNOWN AS E. R. SQUIBB & SONS, INC., D/B/A SQUIBB PHARMACEUTICAL COMPANY; THE UPJOHN CO., A CORPORATION; AMERICAN HOME PRODUCTS CORP., A CORPORATION, D/B/A WYETH LABORATORIES AND D/B/A AYERST LABORATORIES; BURROUGHS WELLCOME & CO. (U.S.A.), INC., A CORPORATION; BRISTOL-MYERS COMPANY, A CORPORATION, D/B/A BRISTOL LABORATORIES; MERCK SHARP & DOHME ORTHOPEDICS COMPANY, INC., A CORPORATION; HOFFMAN-LA ROCHE, INC., A CORPORATION; G. D. SEARLE & CO., A CORPORATION, D/B/A SEARLE LABORATORIES; TRAVENOL LABS, INC., A CORPORATION, D/B/A FLINT LABORATORIES; THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, D/B/A UNIVERSITY OF ALABAMA HOSPITAL PHARMACY AND RUSSELL AMBULATORY CENTER PHARMACY; COOPER GREEN HOSPITAL, A NON-PROFIT CORPORATION, D/B/A COOPER GREEN HOSPITAL PHARMACY; ABC CORP. AND XYZ CORP., WHOSE IDENTITIES ARE UNKNOWN AT THIS TIME TO THE PLAINTIFFS, BUT WILL BE ADDED BY AMENDMENT WHEN ASCERTAINED,

Respondents.

REPLY BRIEF OF PETITIONER, JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.

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Respondents.

STATEMENT OF CASE

This case involves the issue of whether or not the Robinson-Patman Act allows state agencies and subdivisions to unfairly compete with private enterprise by purchasing drugs at discriminatory competitive bid price levels and reselling them to the general public, or whether such state institutions should be required to adhere to the restrictions of the Robinson-Patman Act and Nonprofit Institutions Act as is required of private hospitals.

A. Proceedings in District Court

Suit was brought by the Jefferson County Pharmaceutical Association, Inc., a non-profit corporation which is comprised of pharmacists throughout Jefferson County, Alabama. The suit alleged that fifteen different drug manufacturers (named in the style of this case) were selling drugs to the University of Alabama Pharmacy and Russell Ambulatory Center Pharmacy (both subdivisions of the University of Alabama Medical Center) and Cooper Green Hospital Pharmacy (a county hospital) at discriminatory "bid prices" and that these pharmacies, operating as agencies of the state of Alabama and Jefferson County, were selling drugs procured by "bid purchasing" to the general public in direct competition with privately owned pharmacies (2a). Petitioner's complaint further alleged that sales by these pharmacies are in violation of the *Robinson-Patman Act,* 15 U.S.C. § 13 (6a). The Petitioner in its complaint sought injunctive relief and monetary damages for compensation of injuries suffered as a result and consequence of violations of the proscriptions of the *Robinson-Patman Act.*

All respondents filed motions to dismiss Petitioner's complaint, stating as grounds for dismissal, among other

things, that sales of goods made to a governmental agency or instrumentality are exempt as a matter of law from the sanctions of the *Clayton Act* as amended by the *Robinson-Patman Act,* 15 U.S.C. § 13 (17a-50a).

The District Court held "that governmental purchases are, without regard to 15 U.S.C. § 13c, beyond the intended reach of the *Robinson-Patman Price Discrimination Act* . . . ." The District Court accepted the argument of the respondents saying that although sales to governmental institutions were not specifically treated by the explicit exemption found in 15 U.S.C. § 13c, but there exists an *implicit* exemption for sales to governmental agencies irregardless of whether or not they have entered the retail pharmacy business in direct competition with private enterprise.

B. Proceedings in the Court of Appeals

The Jefferson County Pharmaceutical Association, Inc., appealed the decision of the District Court and the Court of Appeals for the Fifth Circuit confirmed the decision of the District Court without opinion. (Appendix "A" of Petitioner's Petition for Writ of Certiorari filed in this Court on October 30, 1981.) The Honorable Thomas A. Clark, Circuit Judge, dissented and filed an opinion stating that the decision of the majority was in conflict with *Abbott Laboratories v. Portland Retail Druggists, Inc.*, 425 U.S. 1, 96 S. Ct. 1305 (1976). (Appendix "B" of Petitioner's Petition for Writ of Certiorari filed in this Court on October 30, 1981, at page 24a.)

ARGUMENT

I.

THE LEGISLATIVE HISTORY OF THE ROBINSON-PATMAN ACT CLEARLY INDICATES THAT THE ACT COVERS SALES TO GOVERNMENTAL PURCHASERS WHEN THEY COMPETE WITH PRIVATE ENTERPRISE.

The Respondent drug companies have attempted to bring the states within the protection of the principal of statutory construction cited by Mr. Teegarden. (See Abbott brief at pages 14-15, footnotes 17-18.) Their statement of the statutory construction is inaccurate. The principle of statutory construction cited by Mr. Teegarden—"that a statute will not be construed to limit or restrict in any way the rights, prerogatives, or privileges of the sovereign unless it so expressly provides"—is inapplicable when the issue is the application of a *federal* statute to a *state* government. (See *amicus curiae* brief of the National Association of Retail Druggists, pages 9-11.) The respondent drug companies dispute this rule, citing two cases[1] in which a federal statute, the Economic Stabilization Act of 1970, was construed not to apply to state employees. (See brief for respondents, Abbot Laboratories, *et al.*, pages 14-15 and footnotes 17-18.) Respondents failed to mention, however, the subsequent history of these cases. In *Fry v. United States*, 421 U.S. 542 (1975), this Court affirmed a ruling by the temporary emergency court of appeals construing the same act to apply to state employees. This Court found that the language of the act was broad, with no

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[1] *Coan v. State*, 11 Cal. 3d 286, 520 P.2d 1003, 113 Cal. Rptr. 187 (1974), and *State ex rel. Ervin v. Gilligan*, 35 Ohio App. 2d 84, 300 N.E.2d 225 (1973).

exception provided for governmental employees, and stated: "The failure of the act to make express reference to the states does not warrant the inference that controls could not be extended to their employees." 421 U.S. 526 (citations omitted). Although *Fry* does not explicitly cite *Coan* or *Ervin*, it totally demolishes those holdings and their cited reasoning.

Coan is separately distinguishable, because the *Coan* court noted an explicit exception to its rule—one that was not applicable to *Coan* but is applicable in this case—"for regulation of activities constituting a proprietary rather than governmental function." 520 P.2d 1007.

Similarly the cases cited in footnote 18 of respondent Abbott's brief deal only with the applicability of statutes to the *federal* government. Indeed, the case of *Hancock v. Train*, 426 U.S. 167, 179 (1976), deals with whether the federal sovereign *is regulated by a subordinate sovereign*. The situation is wholly dissimilar when one looks at whether federal legislation *regulates subordinate, state governments.*

Clearly, the testimony of Mr. Teegarden, author of the Robinson-Patman Act, before the House judiciary committee of the 74th Congress indicates that the intent of the bill was to bar price discrimination to retailers selling in competition with each other and that, accordingly, the bill would not bar discounts to the federal government because the federal government was not in competition with other purchasers. In pertinent part, the testimony of Mr. Teegarden reads as follows:

> MR. LLOYD. Would this bill, in your judgment, prevent the granting of discounts to the United States Government?
>
> * * *

MR. TEEGARDEN. I do not see why it should, unless a discount contrary to the present bill would be barred—that is, the present law—would be barred by that bill.

Aside from that, my answer would be this: The Federal Government is not in competition with other buyers from these concerns. Therefore a discimination—it is so applied universally in interstate commerce law, in the railroad law—to have a discrimination, there must be a relative position between the parties to the discrimination which constitutes an injury to one as against the other. I think the answer is to be found in that.

In other words, if seller A makes a price to a retailer in New York and a different price to a retailer in San Francisco, all other things aside, no case of discrimination could be predicated there, because the two are not in the same sphere at all.

The Federal Government is saved by the same distinction, not of location but of function. They are not in competition with anyone else who would buy.[2]

Immediately thereafter, Representative Hancock, using city hospital purchases as an example, asked whether the bill would eliminate competitive bidding by states or cities. Mr. Teegarden answered that purchases by a municipal hospital would indeed be covered by the bill when the purchasing hospital was in competition with another hospital:

MR. HANCOCK. It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

---

[2] *Hearings on Bill to Amend the Clayton Act, Before the House Judiciary Committee*, 74th Congress, 1st Session (1935) [hereinafter cited as *Hearings*.]

MR. TEEGARDEN. You mean competitive bidding on Government orders?

MR. HANCOCK. Government, State, city, municipality.

MR. TEEGARDEN. No; I think not.

* * *

MR. HANCOCK. Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?

MR. TEEGARDEN. I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill. If they are not in competition with each other, then they are in a different sphere.[3]

In essence, the author of the act explained that (a) purchases by the federal government are not affected at least when the federal government is not in competition with other buyers; and (b) purchases by state or municipal institutions are within the scope of the act when the institutions compete with other purchasers.

Further, the legislative history of 15 U.S.C. § 13c, the Nonprofit Institutions Act, further demonstrates that it was the understanding of Congress that the Robinson-Patman Act reached purchases by state institutions. The nonprofit exemption, which was passed two years after the Robinson-Patman Act, exempted "purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit" from the

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[3] *Hearings, supra* note 14, at 209 (emphasis supplied).

proscription of the Robinson-Patman Act. The legislative history of this amendment clearly shows that section 13c was intended to protect government institutions, but only to the extent that they purchased supplies for their own use. The intention and determination of Congress to exempt this category of state purchases emphasizes and underscores the fact that this category was previously covered by the Robinson-Patman Act and that all other categories would continue to be covered.

The floor debate on the bill which subsequently became the Nonprofit Institutions Act, conclusively establishes the intent of Congress that the Nonprofit Institutions Act applies to state and local government and their agencies and therefore the Robinson-Patman Act applies to them except as specifically exempted by the Nonprofit Institutions Act. The sponsor of the Nonprofit Institutions Act, Representative Walter, stated that the bill covered, *inter alia,* institutions maintained, controlled, or financed by municipalities, cities, counties, or states, including "a county hospital". Mr. Walter's testimony in pertinent part is as follows:

> MR. SABATH. Mr. Speaker, reserving the right to object, may I inquire of the gentleman whether this bill will also apply to institutions that are maintained and controlled by municipalities and cities? Many of the institutions that are financed by municipalities and by States might come also under its provisions?
>
> MR. WALTER. The bill clearly covers that class of institutions. All charitable institutions are covered by the provisions of this bill.
>
> MR. SABATH. Does the gentleman think a county hospital or a city sanitarium wholly financed by a city, county or State, would come within the provisions of this act?

MR. WALTER. Yes, I do.[4]

Nothing could be more clear. The exemption for nonprofit institutions was written to provide for governmental and private nonprofit hospitals alike, an exemption for "purchases of their supplies for their own use." This exemption was written to codify the intention of drafters of the Robinson-Patman Act.[5] Purchases by all nonprofit hospitals, governmental and private, fall within this exemption—but only so long as they are for the hospital's "own use" and not for resale in competition with private enterprise.[6] Thus, it can be seen that within two years after enacting the Robinson-Patman Act, Congress found it necessary to exempt from that act purchases made by state and local governmental institutions for their own consumption. It is recognized that without an exemption limited to purchase of supplies for their own use institutions owned by state and local governments would not be exempt. Congress could have easily provided a blanket exemption, merely by omitting

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[4] 81 Congressional Record 8706 (August 11, 1937).

[5] 81 Congressional Record 8705 (August 11, 1937).

[6] As noted in *City of Lafayette*, 435 U.S. at 397 n.14 (plurality opinion), Congress included within the Nonprofit Institutions Act "public libraries" which "are, by definition, operated by local government." Other courts have applied the Nonprofit Institutions Act to governmental entities. *Burge v. Bryant Pub. School System* was covered under Nonprofit Institutions Act; *Logan Lanes, Inc. v. Brunswick Corp.*, 378 F.2d 212, 215-16 (9th Cir.), *cert. denied*, 389 U.S. 898 (1967) (purchases by Utah State University within scope of Nonprofit Institutions Act). Indeed, many of the defendants in this action appear to agree that purchases by defendant hospitals fit within the Nonprofit Institutions Act. See the motions to dismiss filed by American Cyanamid Co. (para. 2); Joint Appendix, p. 36a; American Home Products Corp. (para. 7), Joint Appendix, p. 46a.

the words of limitation "of their supplies for their own use." Rather, Congress elected to specifically limit the exemption provided.

Portland Retail Druggists holds that the Nonprofit Institutions Act exempts from the Robinson-Patman Act only those drug purchases made by a nonprofit hospital for its "own use". That is, purchases are exempt only for a use that "promotes the hospital's intended institutional operation in the care of persons who are its patients". 425 U.S. at 14. This Court found certain purchases non-exempt, including purchases for dispensing to former patients as prescription refills, purchases for sale to nondependents of hospital employees, students, and purchases to walk-in customers with no connection with the hospital. Since hospitals owned by states or state subdivisions are covered by the Nonprofit Institutions Act but are not otherwise exempt from the Robinson-Patman Act, the rules set forth in *Portland Retail Druggists* must apply to purchases made by the hospital defendants in this case.

II.

THE FAILURE OF CONGRESS TO AMEND THE ROBINSON-PATMAN ACT CONFIRMS PETITIONER'S PROPOSITION THAT PURCHASES BY A COMPETITOR GOVERNMENTAL AGENCY ARE COVERED BY THE ACT.

The briefs filed by respondent, University of Alabama, and the respondent drug companies echo the District Court's argument that Congress' failure to pass proposed amendments that would have brought governmental purchases within the scope of the Robinson-Patman Act implied a congressional intent to exclude such purchases from the act, and they cite six such proposed amendments. (See Abbott brief, page 23, footnote 19; Uni-

versity of Alabama brief, page 24.) A closer look at the proposed amendments, however, demonstrates that respondents' arguments consist of sheer speculation.

The two earliest amendments[7] would have provided far broader coverage than that asserted in this case. The issue in this case concerns Robinson-Patman coverage of sales (a) to state and local governmental hospitals that are (b) for resale (to nonaffiliated persons). The two proposed amendments, in contrast, would have applied the Robinson-Patman Act to purchases by the federal government as well as by state governments, and arguably, to purchases for consumption for their own use. Congress' failure to pass these bills could easily stem from a reluctance to subject federal purchases to the act, or from the uncertain effect of the Nonprofit Institution Act.

And the four subsequent attempts to amend the Robinson-Patman Act undercut rather than support respondents' arguments. On four separate occasions between 1955 and 1961, Representative Keogh proposed bills that would have placed federal purchases for resale under the Robinson-Patman Act but which said nothing about purchases by states or their subdivisions.[8]

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[7] See H.R. 4452, 82d Cong., 1st Sess. (1951); H.R. 3377, 83d Cong., 1st Sess. (1953).

[8] H.R. 5213, 84th Cong., 1st Sess. (1955); H.R. 722, 85th Cong., 1st Sess. (1957); H.R. 155, 86th Cong., 1st Sess. (1959); H.R. 430, 87th Cong., 1st Sess. (1961). *See Champaign-Urbana News Agency, supra*, 479 F. Supp. at 290. Each bill would have added to the end of Section 2(a) of the Act the following language: "For the purposes of this subsection, when any officer or agency of the United States (including those operating on non-appropriated funds) purchases commodities for resale, such officer

[footnote continued]

None of Representative Keogh's bills were reported out of committee or subjected to reported hearings. Why would a bill even be introduced that would bar price discrimination in purchases by the federal government resale but not in purchases by state and local governments for resale—unless, of course, *it was believed that the later purchases were already covered by the Robinson-Patman Act?* Again, without a record there is simply no way to know.[9]

III.

APPLICATION OF THE ROBINSON-PATMAN ACT TO THE RESPONDENT HOSPITALS IS NOT IN CONFLICT WITH THE TENTH AMENDMENT.

The respondent hospitals in this case are not entitled to the protection and immunity of the Tenth Amendment to the United States Constitution.

Although the activities of the hospital are clearly "affected with a public interest," the functions per-

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or agency shall be deemed to be a purchaser of commodities to which this subsection refers, and such purchases shall be deemed to be in commerce."

[9] "Both the drug companies and the University of Alabama cite prior statements made by Earl W. Kintner on behalf of *amicus* NARD that are allegedly contrary to NARD's current position in favor of Petitioner. [See Abbott brief, p. 24, 41, and n.30, 31; University of Alabama brief, pp. 25-27.] These statements are lifted out of context, however; Mr. Kintner's testimony was addressed not to the applicability of the Robinson-Patman Act to governmental purchases—it merely mentioned the issue, without discussion or analysis, and drew no firm conclusion—but rather to the enforcement of the Act where it clearly does apply. Mr. Kintner's testimony on behalf of NARD was addressed to the harm being suffered by members of NARD due to abuses of the Act by institutional purchasers (such as chain drugstores and private hospitals). *Mr. Kintner did not mention (except parenthetically), and had no reason to reach, the issue presented in this case.*"

> formed by it have not been traditionally associated with sovereignty, . . . and have long been relegated to the private domain, rather than treated as "traditionally the exclusive prerogative of the state." Thus, its activities are not "so clearly governmental in nature" as to amount to a "public function." [Citation to *Jackson v. Metropolitan Edison Company*, 419 U.S. at 345 (1974), omitted.][10]

CONCLUSION

The decision of the Court of Appeals permits state hospitals to obtain discriminatory price concessions from large pharmaceutical manufacturers and to use that overwhelming advantage in retail competition with independent pharmacists. This anticompetitive price advantage is prohibited by the Robinson-Patman Act, which extends to all "persons", a term this Court explicitly has applied to state governments.

The legislative history of the Robinson-Patman Act confirms that the act would apply to purchases by state hospitals for resale in competition with other parties. The intent of Congress was further demonstrated two years after the enactment of the Robinson-Patman Act when Congress narrowed the original act by exempting purchases by nonprofit institutions of "supplies for their own use"; the sponsor of this amendment made it clear that Congress intended to include within its scope hospitals operated by state, county and city governments. Congress certainly would not have included governmental hospitals within this limited exemption if they were already categorically exempt from the provisions of the Robinson-Patman Act.

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[10] *Schlein v. Milford Hospital, Inc.*, 561 F.2d 427 (1977).

This Court has repeatedly refused to find implied exemptions to the antitrust laws. It recently reaffirmed that the antitrust laws applied to health care.[11]

It has underscored Congress' intent that the antitrust laws apply by their terms, that they be broadly construed, that exemptions be narrowly construed, and that special exceptions not be carved out. There is no policy reason to change that view in this case by constructing a *per se* exemption for state hospitals when they are engaged in proprietary activities in competition with retail druggists and private hospitals. Certainly, Congress did not intend such an exemption, and there is neither justification nor need for the courts to create such an exemption. The respondents in this case seek this Court to sanction the very evils that the Robinson-Patman Act was designed and intended to prevent—retail druggists being forced to compete on unfair terms against state hospitals that can use their superior bargaining position to obtain more favorable prices. Certainly, state government is entitled to no special antitrust immunity when it undertakes commercial activities in competition with private enterprise.[12]

The guts of this case were summed up most appropriately in the dissenting opinion of Judge Clark (Fifth

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[11] *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U.S. 378 (1981); *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976).

[12] The U.S. District Court for the Northern District of Mississippi has held that the state is subject to antitrust regulation when it acts as a competitor and the state action exemption will not save it. *Limeco, Inc. v. Division of Lime of the Mississippi Dep't of Agriculture & Commerce*, No. GC81-162-WK-O, N.D. Miss., 9/15/82, 43 Antitrust & Trade Regulation Report 540.

Circuit Court of Appeals) which in pertinent part states as follows:

> [t]he decision permits the six states of this circuit and their agencies to unfairly compete with private enterprises operated by their citizens in the retail sale of goods. A state's size gives it great purchasing power and thus an awesome competitive advantage over private business. To this the court adds the advantage of a license to make use of price discrimination in its wholesale purchases.
>
> * * *
>
> Instead of creating an exemption to the statute, I would follow the policy underlying the antitrust laws. I would hold that, for the purposes of the Robinson-Patman Act, when a state moves outside its traditional sphere of activity and into retail competition with private enterprise, it should be treated in precisely the same manner as its competitors. Today's decision subverts the policy behind the Robinson-Patman Act. It subjects businessmen, who suddenly have found themselves in competition with pharmacies owned by the State of Alabama, to the unfortunate effects of unfair competition without affording them a remedy. This result is not only inequitable, it is in direct conflict with the language and major thrust of the Act.

Jefferson County Pharmaceutical Association v. Abbott, et al., 656 F.2d at 93-94.

Wherefore, Petitioner, Jefferson County Pharmaceutical Association, Inc., respectfully urges this Court to reverse the judgment of the U.S. Court of Appeals for the Eleventh Circuit and to hold that purchases of drugs by hospital pharmacies that are owned by a state or subdivision thereof are exempt from the Robinson-

Patman Act *only* to the extent they are made for the hospital's own use, as provided in 15 U.S.C. § 13c.

Respectfully submitted,

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Amicus Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.
Petitioner,

VS.

ABBOTT LABORATORIES, *et al*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF AMERICAN PHARMACEUTICAL ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF AMERICAN PHARMACEUTICAL ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Pharmaceutical Association ("APhA") respectfully moves this Court for leave to file the accompanying brief amicus curiae in support of the petitioner herein. Although the attorneys for petitioner have consented to APhA's filing of a brief amicus curiae, at the time of the filing of this motion, APhA had not received the consent of the respondents to the filing of a brief amicus curiae.

The American Pharmaceutical Association (APhA) is a non-profit, membership corporation organized and existing under the laws of the District of Columbia since 1852. It is the national professional society of pharmacists in the United States, and its membership consists of about 38,000 practicing

pharmacists, pharmaceutical scientists and educators. Additionally, about 12,000 students enrolled in colleges of pharmacy hold student membership in APhA.

APhA member pharmacists practice their profession in a variety of settings. Some are owners of community pharmacies. Others are employed pharmacists in community pharmacies and in both nonprofit and for-profit hospitals. Yet others serve in the Armed Forces and in government and private health care administration positions. APhA itself has no commercial interest in any pharmacy, nor does it represent the proprietary interests of pharmacist owners of community pharmacies as such.

APhA and, of course, its members are vitally interested in the public health and welfare as they may be affected by the profession of pharmacy. In that regard, APhA's contemporary purpose is to render assistance in improving, promoting, and safeguarding the public health and welfare by: (A) participating in a system of education and training and recommending standards of professional practice; (B) disseminating knowledge to promote the safe and effective use of drugs; (C) encouraging and maintaining relations with other health professions; (D) participating as representative of the profession of pharmacy in the processes of government; (E) encouraging interest in the practice of pharmacy as a professional career and supporting systems of educational accreditation and licensure; (F) providing and maintaining a Code of Ethics for pharmacists; (G) fostering research; and (H) pursuing such other lawful purposes within its corporate powers as may be approved from time to time by its members or Board of Trustees.

The independent community pharmacist today is simultaneously a licensed professional practitioner and a small business proprietor. APhA and its members vigorously support the American free enterprise system which provides the only meaningful climate under which professionals and small businesses can economically survive, have the opportunity to succeed by their own efforts, and perform essential services to their communities.

APhA and its members have a vital interest in assuring the continued widespread availability of pharmaceutical service to the public when and where such service is required. For many persons, the pharmacist is the most readily-accessible health care professional and, in addition to providing generally-recognized drug control and dispensing services, the pharmacist often serves as an initial point of contact or entry for those persons not having a regularized relationship with the health care system or its professional practitioners.

APhA recognizes that the realities of pharmacy practice, as that practice has developed uniquely in this country, includes various means and agencies through which pharmaceutical service is provided to the public under different social, economic and health care requirements. The only issue in the instant case, however, involves the providing of pharmaceutical service by government operated hospitals to ambulatory patients who pay for such service in direct competition with other hospitals and community pharmacies, said governmental hospitals taking advantage of drug product price concessions granted to them, but not to competing pharmacies, by drug manufacturers.

Your amicus is dedicated to the preservation of adequate pharmaceutical service to meet public health needs. APhA recognizes, however, that this objective will fail if one segment of competing pharmaceutical service providers is economically disadvantaged so that it is eliminated or threatened with elimination.

WHEREFORE, the American Pharmaceutical Association requests this Court to grant this motion and permit the Association to file the brief amicus curiae attached hereto.

Respectfully submitted,

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF AMERICAN PHARMACEUTICAL ASSOCIATION

PRELIMINARY STATEMENT

The American Pharmaceutical Association (APhA) submits this brief amicus curiae in support of the Petitioner, Jefferson County Pharmaceutical Association, Inc.

INTEREST OF THE AMICUS

The American Pharmaceutical Association (APhA) is a nonprofit, membership corporation organized and existing under the laws of the District of Columbia since 1852. It is the national professional society of pharmacists in the United

States, and its membership consists of about 38,000 practicing pharmacists, pharmaceutical scientists and educators. Additionally, about 12,000 students enrolled in colleges of pharmacy hold student membership in APhA.

APhA member pharmacists practice their profession in a variety of settings. Some are owners of community pharmacies. Other are employed pharmacists in community pharmacies and in both nonprofit and for-profit hospitals. Yet others serve in the Armed Forces and in government and private health care administration positions. APhA itself has no commercial interest in any pharmacy, nor does it represent the proprietary interests of pharmacist owners of community pharmacies as such.

APhA and, of course, its members are vitally interested in the public health and welfare as they may be affected by the profession of pharmacy. In that regard, APhA's contemporary purpose is to render assistance in improving, promoting, and safeguarding the public health and welfare by: (A) participating in a system of education and training and recommending standards of professional practice; (B) disseminating knowledge to promote the safe and effective use of drugs; (C) encouraging and maintaining relations with other health professions; (D) participating as representative of the profession of pharmacy in the processes of government; (E) encouraging interest in the practice of pharmacy as a professional career and supporting systems of educational accreditation and licensure; (F) providing and maintaining a Code of Ethics for pharmacists; (G) fostering research; and (H) pursuing such other lawful purposes within its corporate powers as may be approved from time to time by its members or Board of Trustees.

The independent community pharmacist today is simultaneously a licensed professional practitioner and a small business proprietor. APhA and its members vigorously support the American free enterprise system which provides the only meaningful climate under which professionals and small businesses can economically survive, have the opportunity to succeed by their own efforts, and perform essential services to their communities.

APhA and its members have a vital interest in assuring the continued widespread availability of pharmaceutical service to the public when and where such service is required. For many persons, the pharmacist is the most readily-accessible health care professional and, in addition to providing generally-recognized drug control and dispensing services, the pharmacist often serves as an initial point of contact or entry for those persons not having a regularized relationship with the health care system or its professional practitioners.

APhA recognizes that the realities of pharmacy practice, as that practice has developed uniquely in this country, includes various means and agencies through which pharmaceutical service is provided to the public under different social, economic and health care requirements. The only issue in the instant case, however, involves the providing of pharmaceutical service by government operated hospitals to ambulatory patients who pay for such service in direct competition with other hospitals and community pharmacies, said governmental hospitals taking advantage of drug product price concessions granted to them, but not to competing pharmacies, by drug manufacturers.

Your amicus is dedicated to the preservation of adequate pharmaceutical service to meet public health needs. APhA recognizes, however, that this objective will fail if one segment of competing pharmaceutical service providers is economically disadvantaged so that it is eliminated or threatened with elimination.

ARGUMENT

The decision below misconceives the scope of the federal antitrust laws and is contrary to the decisions of this Court in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) and *Community Communications Company, Inc. v. City of Boulder*, ____ U.S. ____, 50 U.S.L.W. 4144 (U.S. Jan. 12, 1982). While it may be argued that the Robinson-Patman Act was not intended to apply to purchases of goods in commerce by government entities for their own consumption, there is no support, either legally or on the basis of legislative history, for

the proposition that governmental purchases are *per se* exempt from application of the Act, when they are used to conduct proprietary, as opposed to sovereign, activities in the marketplace through resale to the general public.

On numerous occasions, this Court has affirmed the comprehensive coverage of the antitrust laws and has recognized that those laws represent "a carefully studied attempt to bring within the [antitrust laws] every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 553 (1944). In *City of Lafayette, supra,* this Court held that the definitions of "persons" contained in the Sherman Act and the Clayton Act included states, cities, municipalities, and their agencies. The lower courts herein attempted to distinguish *City of Lafayette* on the basis that that case involved claims under the Sherman Act rather than the Robinson-Patman Act. Such a distinction ignores the intentionally broad language utilized in *City of Lafayette* and the Court's specific reference to the Robinson-Patman Act in its discussion of the all-inclusive nature of the term "persons." 435 U.S. at 397, n. 14.

City of Lafayette involved antitrust claims brought by cities in Louisiana, which owned and operated electric utility systems, against investor-owned utilities operating in the same areas. The investor-owned utilities counterclaimed against the cities, alleging similar antitrust violations. The issue before this Court was whether or not the cities were subject to suit under federal antitrust laws.

The cities contended that the "state action" doctrine enunciated in *Parker v. Brown*, 317 U.S. 341 (1943) rendered the antitrust laws inapplicable to them. This Court disagreed. First, the Court addressed the purposes and intended scope of the antitrust laws, noting that Congress "sought to establish a regime of competition as the fundamental principal governing commerce in this country." 435 U.S. at 398.

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.

> They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster."

Id. at 392 n. 16 quoting *United States v. Topco Associates,* 405 U.S. 596, 610 (1972). The Court reiterated its holdings that, because "the antitrust laws establish overreaching and fundamental policies," there was a presumption against any implied exclusions from those laws, and then addressed the cities' contention that their operation of utilities was a public service and that the antitrust laws were intended only to prevent abuses of private power.

The Court acknowledged that a public benefit might flow from anticompetitive activity of a municipality, but was unwilling to hold that such a potential benefit could override the policy underlying the antitrust laws.

> "Every business enterprise, public or private, operates its business in furtherance of its own goals. In the case of a municipally owned utility, that goal is likely to be, broadly speaking, the benefit of its citizens. But the economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders.
>
> * * *
>
> When [cities] act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and

> efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender. If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established."

Id. at 403, 408.

Having determined that there was nothing in the antitrust laws, either express or implied, that excluded municipalities from coverage, the Court addressed the possible applicability of *Parker v. Brown, supra.* In its opening statement on *Parker,* the Court firmly established the exact opposite of the holding of the courts in the instant case: "Plainly petitioners are in error in arguing that *Parker* held that all governmental entities, whether state agencies or subdivisions of a State, are simply by reason of their status as such, exempt from the antitrust laws." *City of Lafayette, supra,* at 408. As recently as this term, the Court reemphasized this principle in *Community Communications Company, Inc. v. City of Boulder:* "[The antitrust laws], like other federal laws imposing civil or criminal sanctions upon 'persons', of course apply to municipalities as well as other corporate entities." 50 U.S.L.W. at 4148.

Despite the clear holdings in *City of Lafayette* and *City of Boulder,* the courts below in the instant case held "that governmental purchases are . . . beyond the intended reach of the Robinson-Patman Price Discrimination Act . . ." 656 F.2d at 102. The only basis upon which those courts sought to distinguish *City of Lafayette* was that there the Sherman Act was involved rather than the Robinson-Patman Act. Having so facilely disposed of the teaching of *City of Lafayette,* the lower courts reviewed the legislative history of the Robinson-Patman Act and concluded that a governmental exemption was implicitly intended.

The courts below, in reviewing the legislative history, focused on the testimony of H.B. Teegarden and his expression

of opinion that the Act would not prevent the granting of discounts to the United States government. *Hearings before the House Committee on the Judiciary on Bills to amend the Clayton Act,* 74th Congress, 1st Session, p. 208. The courts also relied on statements by Representative Patman and opinions of the Attorney General of the United States which support the same proposition. The courts failed, however, to recognize the crucial distinction made by Mr. Teegarden in his testimony and left unaddressed by Representative Patman and the Attorney General. Mr. Teegarden's initial opinion was based on the assumption that the purchases by the federal government would be for purposes of the government's own use and consumption. When asked whether a city hospital could purchase goods at a lesser price than that made available to a privately-owned hospital, Mr. Teegarden responded:

> "I would have to answer it this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill. If they are not in competition with each other, then they are in a different sphere."

Hearings, supra at 209.

This interpretation of the Robinson-Patman Act (that governmental purchases are covered if made for resale in marketplace competition with the private sector) is further buttressed by this Court's decision in *Abbott Laboratories v. Portland Retail Druggists Ass'n.*, 425 U.S. 1 (1976). There, in interpreting the Nonprofit Institutions Act of 1938, 15 U.S.C. §13c (a specific statutory exemption from the Robinson-Patman Act), the Court construed the limited exemption provided for purchases made by designated nonprofit institutions "for their own use." 425 U.S. at 14. The court held that not all purchases were thereby exempted from the Robinson-Patman Act, recognizing that were a nonprofit hospital allowed to purchase and sell drugs to all individuals

(particularly "walk-in" patients) at a price less than that available to commercial pharmacies, the hospitals would be "devastatingly positioned with respect to competing pharmacies." 425 U.S. at 18.

The same rationale is applicable in the instant case. If the thinking of the courts below is sustained by this Court and state and municipal hospitals and pharmacies permitted to buy drugs at lower prices than other pharmacies, and sell those drugs without restriction, there would result a severe distortion and disruption of the marketplace, a condition which the antitrust laws were intended to prevent. Such a result would reinstitute the chaotic marketplace situation thought by many to have been cured by this Court's decision in *Abbott Laboratories* v. *Portland Retail Druggists Ass'n., supra.* Now, governmental entities would be arrayed against, and "devastatingly positioned," with respect to both non-government hospitals and community pharmacies. The antitrust laws represent a "congressional commitment to the policy of free markets and open competition" and any adverse consequences which may be suffered by governmental entities subjected to antitrust coverage are insufficient to override that commitment. *City of Boulder, supra,* at 4148.

In the instant case, the antitrust claims lodged by the petitioner were dismissed solely on the basis that state and municipal entity purchases were exempt *per se* from the Robinson-Patman Act. There was no contention that the State of Alabama had adopted a "clearly articulated and affirmatively expressed state policy" sanctioning anticompetitive municipal activities. See, *City of Boulder, supra; California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980). Nor was there any contention that the activity complained of, namely the governmental operation of hospitals and pharmacies reselling drugs to the general public in competition with other pharmacies, was an activity required by the State acting as sovereign and essential to a state's policy and plans. See, *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 790 (1975); *City of Lafayette, supra,* at 425-26. (Burger, C.J. concurring). The only inquiry was whether or not purchases by

state and municipal hospitals and pharmacies were exempt *per se* from the Robinson-Patman Act. As the above discussion demonstrates, the answer to such an inquiry must be "No." For every reason stated therein upholding the overriding policy of the antitrust laws, *City of Lafayette, supra,* requires its extension at least to the governmental proprietary activities at issue in the instant case. The contention that the anticompetitive activity at issue has been engaged in by a governmental entity "only begins the analysis, for it is not every governmental act that points a path to an antitrust shelter." *Woods Exploration & Producing Company, Inc. v. Aluminum Company of America,* 438 F. 2d 1286, 1294 (5th Cir. 1971). It is respectfully submitted that the decision below must be reversed in order that the trial court may conduct such a further analysis.

CONCLUSION

APhA is dedicated to the preservastion of adequate pharmaceutical service to meet public needs. This objective will fail if one segment of competing pharmaceutical service providers is economically disadvantaged so that it is eliminated or threatened with elimination. There is no state interest sufficient to sanction the operation of state and municipal hospitals and pharmacies outside of the coverage of the antitrust laws when the result would be a disruption of a free marketplace. Your amicus respectfully urges reversal of the decisions below.

Respectfully submitted,

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENTS

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On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENTS

All parties have consented to the filing of this *amicus curiae* brief in support of respondents, pursuant to Rule 36.2 of the Rules of this Court. *See* Letter of May 21, 1982, to Hon. Alexander L. Stevas from Counsel for National Association of Counties.

INTEREST OF AMICUS CURIAE

The National Association of Counties (NACo) is the single organization representing 2,120 county governments across the United States. Organized by county officials in the depths of the Great Depression, NACo today speaks for member counties throughout urban, suburban, and rural America, in which more than 75 percent of the Nation's population lives. NACo pro-

motes the common position of its members on national policy issues, judicial trends, and legislative initiatives of concern to county government. Of particular concern to NACo and its members are developments bearing on county government's ability to deliver broad-based community health services at lowest cost.

ARGUMENT

Counties, as local arms of the State, perform State functions at the local level. Included in those functions is the providing of medical services to the indigent and the aged. Much of the medical and psychiatric services provided by the counties are made available at great cost to the tax paying public. Soaring health costs make the procurement and dispensing of medications by county hospitals at the lowest possible cost essential to the discharge of that governmental function.

Most county hospitals are mandated by the laws of their respective states to provide medical care and treatment of indigent persons and to provide outpatient care and medications. Government-operated hospitals, in these times of increased costs, reduced revenues, and the unemployed needing medical care without the benefit of insurance coverage, should not be subjected to even higher costs in providing mandated services to the indigent and the aged.

Government hospitals serve a segment of society which has no other choice. They operate for the public good. They serve that portion of the public which is not served by the private or even the "non-profit" hospital. Government hospitals, therefore, are not in competition with private or non-profit hospitals. Their existence is for but one purpose: to provide low-cost medical and hospital care to those citizens who cannot, because of economics, choose otherwise. Such low-cost service benefits the public as a whole, since public funds not used for medical services may be used for other public services.

CONCLUSION

Both to preserve lowest-cost delivery of broad-based health services by instrumentalities of county government, and to avoid the inescapably disastrous financial consequences to county government of eliminating competitive bidding for county hospital purchases of pharmaceutical products, NACo urges affirmance of the judgment of the United States Court of Appeals for the Fifth Circuit for the reasons set forth above and in the briefs on the merits filed herein by respondents Board of Trustees of the University of Alabama and respondent pharmaceutical manufacturers, and joins in the arguments made in those briefs.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.,

Petitioner,

vs.

ABBOTT LABORATORIES, a corporation, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS

All parties have consented to the filing of this Brief for *amicus curiae* in support of Petitioner, pursuant to Rule 36.2 of the Court.[1]

INTEREST OF AMICUS CURIAE

Founded in 1898, the National Association of Retail Druggists (NARD) is a private, non-profit, voluntary organization composed of approximately 20,000 independent retail pharmacists, who own approximately 30,000 independent retail

[1]See letter to Mr. Stevas from counsel to NARD with attachments (April 22, 1982).

pharmacies. NARD is the only national association which represents exclusively the interests of independent retail druggists. NARD has members in all fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands. It is estimated that NARD members serve 18 million consumers daily. Independent retail pharmacists fill approximately 70% of the prescriptions filled at retail in the United States.

Members of NARD compete with each other, with chain drug stores, and with hospital pharmacies, many of which are operated by agencies or subdivisions of states, in the sale at retail of prescription and non-prescription drugs. The decision by the Court of Appeals exempting state-owned hospitals from the strictures of the Robinson-Patman Act adversely affects NARD members because it gives state-owned hospitals, with which NARD members increasingly find themselves in competition,[2] a favored competitive position due to the hospitals' ability to obtain pharmaceuticals at lower cost than can members of NARD. As a result NARD members have lost, and will continue to lose, retail sales, profits, and competitive position in the retail prescription and non-prescription drug markets. Thus the applicability of the antitrust laws to purchases of pharmaceuticals for resale by state-owned or affiliated hospitals is of vital interest to retail pharmacists, and the decision of the Eleventh Circuit that such purchases are beyond the reach of the Robinson-Patman Price Discrimination Act has a direct and significant impact on NARD members.

SUMMARY OF ARGUMENT

Six years ago, in *Abbott Laboratories v. Portland Retail Druggists Association*, 425 U.S. 1 (1976), this Court held that

[2]In 1979, state and local government hospitals made pharmaceutical purchases in excess of $400 million, representing 4% of the market. Information as to the extent such purchases were made for resale is unavailable. PMA, *U.S. Pharmaceutical Industry 1979-1980 Annual Survey Report* 11.

drug purchases by nonprofit hospitals are exempt from the Robinson-Patman Price Discrimination Act only where made for the hospitals' "own use," pursuant to the specific exemption provided by the Nonprofit Institutions Act, 15 U.S.C. § 13c. The District Court[3] in this case carved out a separate and broader implied exemption for purchases by hospitals which are owned by agencies or subdivisions of states. In granting defendants' motions to dismiss, the District Court, while accepting as true the allegations in the Complaint that local retail pharmacies had been injured by the challenged price discrimination, held that such price discrimination did not violate the Robinson-Patman Act, on the ground that there is an implied exemption for purchases by state hospitals, even where the hospitals are not the ultimate consumers but resell the purchased goods in competition with private enterprises. Thus the question in this case is whether sales to and purchases by state hospitals[4] of goods for resale in the market place in competition with private business enterprises are exempt from the proscriptions of the Robinson-Patman Act.

The District Court's decision to imply a governmental exemption into the Robinson-Patman Act directly contradicts this Court's often-expressed presumption against implicit exemptions to the antitrust laws.[5] The District Court's decision also

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[3]The District Court judgment was "[affirmed] on the basis of the district court's Memorandum of Opinion" by the Fifth Circuit and appeared as an appendix to the Court of Appeals decision. Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories, 656 F.2d 92, 93 (5th Cir. 1981). All references herein to the "District Court" refer to that Memorandum of Opinion.

[4]Except where otherwise noted, all references to state hospitals include those owned or operated by agencies or subdivisions of the state or by other local governmental entities.

[5]*See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51(1963).

contradicts the decisions of this Court in *City of Lafayette,*[6] *City of Boulder,*[7] and prior cases that state and local agencies are not immune from the antitrust laws. The District Court's opinion would allow state agencies to enter freely all fields of commercial endeavor, immune from the reach of laws "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[8]

The District Court made its decision despite the fact that on its face the Robinson-Patman Act, like other antitrust laws, reaches conduct by states and their subdivisions. The legislative history of the Robinson-Patman Act confirms that Congress intended that purchases by state or local governmental entities fall within the Act when those entities act in competition with other purchasers. Two years later, in the Nonprofit Institutions Act, Congress determined to exempt from the Robinson-Patman Act purchases made by nonprofit institutions "for their own use," recognizing that without this exemption such purchases, and therefore such institutions, were not exempt. The legislative history of that amendment makes clear that Congress intended this exemption to apply to governmental as well as private nonprofit hospitals. Thus purchases by state hospitals are exempt from the Robinson-Patman Act, when, and only when, they are made for consumption rather than resale.

The District Court opinion cited district court decisions, attorney general opinions, and treatises to support its holding. These authorities are inapplicable. They involve purchases by the federal government, or by a governmental entity for its own

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[6]City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

[7]Community Communications Co. v. City of Boulder, 102 S. Ct. 835 (1982).

[8]United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

consumption (which are exempt under the Nonprofit Institutions Act), and do not reach the issue of purchases by a governmental entity for resale in competition with private enterprises. Moreover, the District Court was apparently unaware of certain judicial decisions, and discounted certain attorney general opinions, that were contrary to its position.

Finally, application of the Robinson-Patman Act to state purchases for resale raises no substantial Tenth Amendment problems. *Hodel v. Virginia Surface Mining & Reclamation Association*[9] held that to establish a Tenth Amendment violation a three-prong test must be met: the challenged statute must regulate the "States as States"; it must address matters that are "indisputably 'attributes of state sovereignty' "; and the states' compliance with federal law must directly impair their ability to "structure integral operations in areas of traditional functions." The purchase of drugs for resale is a proprietary activity which does not give rise to a Tenth Amendment defense against application of the Robinson-Patman Act.

Wherefore, *amicus curiae* NARD respectfully urges this Court to reverse the judgment below and hold that purchases of drugs by state hospitals are exempt from the Robinson-Patman Act only to the extent they are made for the hospitals' own use.

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[9]101 S. Ct. 2352 (1981) (citations omitted).

ARGUMENT

I. PURCHASES FOR RESALE BY DEFENDANT STATE HOSPITAL PHARMACIES FALL UNDER THE ROBINSON-PATMAN ACT.

A. The Robinson-Patman Act, By Its Terms, Applies to All Persons, Including State And Local Governments.

The antitrust laws apply to anticompetitive conduct of state and local governments, particularly with respect to their proprietary enterprises.[10] As the District Court recognized, the terms "persons" and "purchasers" in the Robinson-Patman Act are "sufficiently broad to cover governmental bodies." 656 F.2d at 99. This Court has held that the word "person," as used in the Clayton Act[11] and the Sherman Act,[12] includes states and their political subdivisions. *City of Lafayette,* 435 U.S. at 394-97

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[10]*See* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 418-26 & 422 n.3 (1978) (Burger, C.J., concurring). *See generally* M. Wells & W. Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law,* 66 Va. L. Rev. 1073 (1980).

[11]The Robinson-Patman Act's amendment of § 2(c) of the Clayton Act, 15 U.S.C. § 13(c), which prohibits "any person" acting for a purchaser from receiving any brokerage fee from the seller, applies to state governmental procurement officers acting within the scope of their job. Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851, 858-59 (9th Cir. 1965); *cited with approval in* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972). It makes no sense to interpret the word "person" any differently in § 2(c) than in §§ 2(a) or (f).

[12]This Court has found the Sherman Act applicable to states but not to the United States. *Compare* United States v. Cooper Corp., 312 U.S. 600 (1941) (United States not "person" within meaning of § 7 of Sherman Act) *with* Georgia v. Evans, 316 U.S. 159 (1942) (state is person within meaning of § 7 of Sherman Act); *see* Sea-Land Serv., Inc. v. Alaska R.R., 659 F.2d 243 (D.C. Cir. 1981).

(plurality opinion);[13] *City of Boulder,* 102 S. Ct. at 842. Thus the clear language of the statute and this Court's prior decisions are sufficient to show that purchases by state and local government hospitals are within the reach of the Robinson-Patman Act.

B. The Legislative History Of The Robinson-Patman Act Demonstrates That The Act Is Intended To Cover Purchases By A State To The Extent The State Acts As Competitor Rather Than Consumer.

If one goes beyond the statutory language, one finds that the legislative history of the Robinson-Patman Act clearly demonstrates that no implied blanket immunity to purchases by state and local governmental entities was intended by Congress. Rather than suggesting an implied exemption, the debate prior to passage makes it abundantly clear that Congress intended the Act to apply to purchases by a state when the state was acting in competition with another purchaser.

This is demonstrated in the questioning of H.B. Teegarden, author of the Act.[14] Responding to Representative Lloyd's questions concerning discounts to the federal government, Mr. Teegarden explained that the intent of the bill was to bar price

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[13]The District Court's attempt to distinguish this case from *City of Lafayette* on the basis of the different reach of the Robinson-Patman and Sherman Acts, 656 F.2d at 99-100, is clearly erroneous. The only difference in reach between the two laws is the extent to which the activities complained of must affect interstate commerce. Congress' decision in the Robinson-Patman Act not to cover all transactions within its reach under the Commerce Clause, Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199-201 (1974), does not mean that Congress chose not to cover the same range of "persons" whose conduct "in commerce" is otherwise subject to the Act.

[14]*Hearings on Bills to Amend the Clayton Act, Before the House Judiciary Committee,* 74th Cong., 1st Sess. 9 (1935) (statement of Rep. Patman) [hereinafter cited as *Hearings*].

discrimination to retailers selling in competition with each other and that, accordingly, the bill would not bar discounts to the federal government because the federal government is not in competition with other purchasers:

> Mr. LLOYD. Would this bill, in your judgment, prevent the granting of discounts to the United States Government?
>
> * * * *
>
> Mr. TEEGARDEN. I do not see why it should, unless a discount contrary to the present bill would be barred – that is, the present law – would be barred by that bill.
>
> *Aside from that, my answer would be this: The Federal Government is not in competition with other buyers from these concerns. Therefore a discrimination – it is so applied universally in interstate commerce law, in the railroad law – to have a discrimination, there must be a relative position between the parties to the discrimination which constitutes an injury to one as against the other. I think the answer is to be found in that.*
>
> In other words, if seller A makes a price to a retailer in New York and a different price to a retailer in San Francisco, all other things aside, no case of discrimination could be predicated there, because the two are not in the same sphere at all.
>
> *The Federal government is saved by the same distinction, not of location but of function. They are not in competition with any one else who would buy.*[15]

Immediately thereafter, Representative Hancock, using city hospital purchases as an example, asked whether the bill would eliminate competitive bidding by states or cities. Mr. Teegarden

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[15] *Hearings, supra* note 14, at 208-09 (emphasis supplied).

answered that purchases by a municipal hospital would indeed be covered by the bill when the purchasing hospital was in competition with another hospital:

> Mr. HANCOCK. It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?
>
> Mr. TEEGARDEN. You mean competitive bidding on Government orders?
>
> Mr. HANCOCK. Government, State, city, municipality.
>
> Mr. TEEGARDEN. No; I think not.
>
> * * * *
>
> Mr. HANCOCK. Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?
>
> Mr. TEEGARDEN. *I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill. If they are not in competition with each other, then they are in a different sphere.*[16]

In essence, the author of the Act explained that (a) purchases by the federal government are not affected at least when the federal government is not in competition with other buyers; and (b) purchases by state or municipal institutions are within the scope of the Act when the institutions compete with other purchasers.

The District Court totally misunderstood Mr. Teegarden's explanation when it stated that the bill "would not require bidding

[16] *Hearings, supra* note 14, at 209 (emphasis supplied).

to cities and counties on the same basis as to private purchasers and . . . would not prevent competitive bidding on governmental purchases below trade price levels." 656 F.2d at 100 (footnote omitted). Indeed, as the District Court's own opinion recognized. Mr. Teegarden's answers "could be understood as premised upon the fact that governmental purchases would not typically have a potential effect upon competition." 656 F.2d at 100 n. 8. Mr. Teegarden in fact emphasized that purchases by a governmental entity *would* be covered where the governmental entity is in competition with private purchasers. The transactions at issue in this case involve just such competition with private enterprises.

The District Court rejected this obvious reading of Mr. Teegarden's testimony because of Mr. Teegarden's "reliance on principles of statutory construction." *Id.* Mr. Teegarden's reference, however, contained in a subsequent letter to the Committee,[17] concerned only his earlier testimony discussing purchases by the *federal* government. The cited principle of statutory construction — "that a statute will not be construed to limit or restrict in any way the rights, prerogatives, or privileges of the sovereign unless it so expressly provides" — is inapplicable when the issue is the application of a *federal* statute to a *state* government.[18] Thus his letter provides no basis for concluding that Mr. Teegarden meant anything other than what he so plainly said — that state hospitals purchasing for resale in

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[17] *Hearings, supra* note 14, at 250.

[18] *Hearings, supra* note 14, at 250. Mr. Teegarden cited two Supreme Court cases, Dollar Savings Bank v. United States, 86 U.S. (19 Wall.) 227, 239 (1874), and United States v. Herron, 87 U.S. (20 Wall.) 251, 255 (1874) (statute does not restrict "sovereign authority of the country" unless sovereign specifically named). Those cases may support an argument that purchases by the United States, the *enacting* sovereign, are exempt from the Robinson-Patman Act, but support no such argument with respect to purchases by state or local governmental entities. *See* the cases cited in note 12, *supra*.

competition with private hospitals are covered by the Robinson-Patman Act.

C. The Nonprofit Institutions Act Exempts Purchases For "Own Use" By Both Charitable and Governmental Institutions.

The legislative history of the Nonprofit Institutions Act, 15 U.S.C. § 13c, further demonstrates that Congress understood the Robinson-Patman Act to reach purchases by state institutions. Passed two years after the Robinson-Patman Act, section 13c exempted from the scope of the Robinson-Patman Act "purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit." The legislative history clearly shows that section 13c was intended to protect government institutions, but only to the extent they purchased supplies for their own use.[19] Congress' determination to exempt this category of state purchases underscores the fact that this category was previously covered by the Act and that other categories continue to be covered.

The floor debate on H.R. 8148, which subsequently became the Nonprofit Institutions Act, establishes conclusively Congress' intention that the Nonprofit Institutions Act apply to state and local governmental institutions and therefore that the Robinson-Patman Act apply to them except as specifically exempted by the Nonprofit Institutions Act. The sponsor of H.R. 8148, Representative Walter, stated that the bill covered, *inter alia,* institutions maintained, controlled, or financed by municipalities, cities, counties, or states, including "a county hospital."

> Mr. SABATH: Mr. Speaker, reserving the right to object, may I inquire of the gentleman whether this

[19]The District Court's apparent lack of awareness of this critical legislative history, 656 F.2d at 102, may help to explain its misreading of the Act.

> bill will also apply to institutions that are maintained and controlled by municipalities and cities? Many of the institutions that are financed by municipalities and by States might come also under its provisions?
>
> Mr. WALTER. The bill clearly covers that class of institution. All charitable institutions are covered by the provisions of this bill.
>
> Mr. SABATH: Does the gentleman think a county hospital or a city sanitarium wholly financed by a city, county or State, would come within the provisions of this act?
>
> Mr. WALTER. Yes, I do.[20]

Nothing could be clearer. The Nonprofit Institutions Act was written to provide, for governmental and private nonprofit hospitals alike, an exemption for "purchases of their supplies for their own use." This exemption was written to codify the intention of drafters of the Robinson-Patman Act.[21] Purchases by all nonprofit hospitals, governmental and private, fit within this exemption — but only so long as they are for the hospital's "own use."[22]

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[20]81 Cong. Rec. 8706 (Aug. 11, 1937).

[21]*See* 81 Cong. Rec. 8705 (Aug. 11, 1937).

[22]As noted in *City of Lafayette*, 435 U.S. at 397 n.14 (plurality opinion), Congress included within the Nonprofit Institutions Act "public libraries" which "are, by definition, operated by local government." Other courts have applied the Nonprofit Institutions Act to governmental entities. Burge v. Bryant Pub. School Dist., 520 F. Supp. 328 (E.D. Ark. 1980), *aff'd on other grounds*, 658 F. 2d 611 (8th Cir. 1981) (nonprofit, tax-supported school system was covered under Nonprofit Institutions Act); Logan Lanes, Inc. v. Brunswick Corp., 378 F.2d 212, 215-16 (9th Cir.), *cert. denied*, 389 U.S. 898 (1967) (purchases by Utah State University within scope of Nonprofit Institutions Act). Indeed, many of the defendants in this action appear to agree that purchases by defendant hospitals fit within the Nonprofit Institutions Act. See the motions to dismiss filed by American Cyanamid Co. (para. 2); American Home Products Corp. (para. 7);

In sum, two years after enacting the Robinson-Patman Act Congress found it necessary to exempt from that Act purchases made by state and local governmental institutions for their own consumption. It thus recognized that without this exemption – one limited to purchases "of their supplies for their own use" – institutions owned by state and local governments would not be exempt. Congress could have easily provided a blanket exemption, merely by omitting the words of limitation "of their supplies for their own use." It elected not to do so.[23]

Portland Retail Druggists holds that the Nonprofit Institutions Act exempts from the Robinson-Patman Act only drug purchases made by a nonprofit hospital for its "own use" – *i.e.*, use that "promotes the hospital's intended institutional operation in the care of persons who are its patients." 425 U.S. at 14. This Court found certain purchases non-exempt, including purchases for dispensation to former patients as prescription refills, purchases for sale to nondependents of hospital employees, students, or physician staff, and purchases to walk-in customers with no present connection with the hospital. Since hospitals owned by states or state subdivisions are covered by the Nonprofit Institutions Act but are not otherwise exempt from the Robinson-Patman Act, the rules set forth in *Portland Retail*

Ciba-Geigy Corp. (para. 5); Pfizer Inc. (para 5); G.D. Searle & Co. (para 6); E.R. Squibb & Sons, Inc. (para. 5); Travenol Laboratories, Inc. (para. 6); and Upjohn Co. (para. 5).

[23]While this example of congressional action after passage of the Robinson-Patman Act in 1936 confirms the Act's application to governmental purchases for resale, the post-1936 examples of congressional inaction cited by the District Court, 656 F.2d at 101, suggest nothing to the contrary, if they suggest anything at all. With no hearings or debate it is simply impossible to know why Congress failed to act.

Druggists must apply to purchases made by the hospital defendants in this case.[24]

D. The Attorneys General Of California And Georgia Have Held That The Robinson-Patman Act Applies To Governmental Bodies When Acting In Competition With Private Enterprises.

In a 1937 opinion, the Attorney General of California[25] concluded that the Robinson-Patman Act applies to all government contracts that produce the anticompetitive effect required by section 2(a) of the Robinson-Patman Act. Finding that governmental bodies are not *per se* exempt from the proscriptions of the antitrust laws, the Attorney General held that the Robinson-Patman Act, if otherwise applicable, "would not be held inapplicable . . . merely because the acts constituting the violation occurred in connection with a government contract, federal, state or municipal."

And a 1949 opinion rendered by the Attorney General of Georgia[26] is remarkable for its clear perception of the distinction between a government acting in direct competition with private enterprises and one performing traditional government functions. The Attorney General found that a state-run Factory for the Blind would not be subject to the Robinson-Patman Act

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[24]The District Court stated that the Supreme Court in a footnote in *Portland Retail Druggists* "noted without criticism that the trial court had dismissed counts based on sales to governmental hospitals 'for failure to state a claim.' " 656 F.2d at 99. The cited footnote, however, merely states, neither with criticism nor with approval, a procedural fact not then at issue before the Court. 425 U.S. at 4 n.2. And, as is discussed below, the earlier district court's oral, unpublished order of dismissal was based on inapplicable authority.

[25]Opinion of Attorney General of California, 1932-1939 Trade Cas. (CCH) ¶ 55,156 at 415 (1937).

[26]Opinion of Attorney General of Georgia, 1949 Trade Cas. (CCH) ¶ 62,455 (1949).

when it sold to the state and its agencies, but would become subject to the Act if it were to sell its products outside the state in competition with private enterprises. The opinion concluded that when the legislature authorized sales to parties other than the state, it "left the field of governmental activities and entered the field of private enterprise through interstate transactions," and "divested itself of the sovereignty by its own legislation under which it assumes to act in a proprietary capacity." *Id.* at 63,340.[27]

II. THE AUTHORITY CITED BY THE DISTRICT COURT IS INAPPLICABLE.

A. The Decided Cases Do Not Support The District Court's Holding.

The District Court stated that "[e]very judicial decision on the question has held the Robinson-Patman Act inapplicable to governmental purchases" and that "[r]eviewing appellate courts have never disapproved such rulings." 656 F.2d at 101. The first statement is in error, however, and before this case no appellate court had ever approved such a ruling.

1. Courts Have Applied the Robbinson-Patman Act to Governmental Purchases.

The District Court apparently was unaware of several decisions applying the Robinson-Patman Act to governmental purchases. For example, in *A.J. Goodman & Sons v. United Lacquer Manufacturing Corp.*, 81 F. Supp. 890 (D. Mass. 1949),

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[27]The District Court's attempt to distinguish this opinion from the instant case on the basis that the opinion addressed sales *by* a state rather than sales *to* a state, 656 F.2d at 101 n.9, must be rejected. The Attorney General's broader concern – the applicability of the Robinson-Patman Act to activity by a governmental entity in direct competition with private enterprises – does not depend on whether the state happens to be buyer or seller.

the plaintiff alleged price discrimination in sale of lacquer to the State of New Hampshire. Because the plaintiff was not an actual purchaser and injury had not been shown, the case was dismissed. Nowhere was an exemption for state purchases even hinted at.

In the recent case of *Burge v. Bryant Public School District, supra* note 22, the Robinson-Patman Act was applied to purchases by a public tax-supported school district, alleged to be in violation of section 2(c) of the Robinson-Patman Act because the school district required successful bidders to provide a discount. The district court granted summary judgment to the defendant on the alternative grounds that (a) the school district was covered under the Nonprofit Institutions Act and the purchases were for its "own use," and (b) the explicit exemption in section 2(c) for discounts reflecting services rendered by the purchaser was applicable. On appeal, the Eighth Circuit affirmed on the second ground "[w]ithout reaching the issue of exemption under the Robinson-Patman Act." 658 F.2d at 612. Thus both courts applied the Act to purchases by the municipal school board but found specific exemptions within the Act applicable.

Champaign-Urbana News Agency v. J.L. Cummins News Co.,[28] found the Robinson-Patman Act inapplicable to purchases by the Army and Air Force Exchange Service but strongly suggested that state and local governments would face an opposite result. The district court found the Exchange Service exempt because of sovereign immunity, but explicitly distinguished *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), because the governmental antitrust defendant, a board of the District of Columbia, was "more like a state agency or instrumentality." 479 F. Supp. at 287. The Court of Appeals' lengthy analysis of the Exchange Service's

[28]479 F. Supp. 281 (C.D. Ill. 1979), *aff'd*, 632 F.2d 680 (7th Cir. 1980).

status, function, and operation, 632 F.2d at 683-87, indicates that the court rejected a general exemption of government instrumentalities from the Robinson-Patman Act. Significantly, the Exchange Service limited its sales to military personnel and their families, sales that would be considered "own use" under *Portland Retail Druggists,* 425 U.S. at 16-19.

2. The Cases Cited by the District Court Are Inapplicable.

The decisions cited by the District Court to support its position are generally inapplicable. Six of the eight cases, four of which contain only *dicta,* involve purchases by a governmental body for its own consumption; the remaining two offer only minimal analysis. Until this case, no appeals court had ever approved the district court's view.

For example, *General Shale Products Co. v. Struck Construction Co.,*[29] involved alleged price discrimination in bidding by a construction company for a city housing project; the court held the Robinson-Patman Act inapplicable on the ground that "[n]either the government nor a city in its purchase of property considered necessary for the purposes of *carrying out its governmental functions* is in competition with another buyer who may be engaged in *buying and reselling* that article." 37 F. Supp. at 603 (emphasis supplied).

In *Logan Lanes, Inc. v. Brunswick Corp.,*[30] the Ninth Circuit refused to affirm the lower court's holding of a blanket governmental immunity but found for the defendant because the purchases were for the University's own use and thus were exempt

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[29]37 F. Supp. 598 (W.D. Ky. 1941), *aff'd on other grounds,* 132 F.2d 425 (6th Cir. 1942), *cert. denied,* 318 U.S. 780 (1943).

[30]No. 4-66-5 (D. Idaho 1966), *aff'd on other grounds,* 378 F.2d 212 (9th Cir.), *cert. denied,* 389 U.S. 898 (1967).

from the Robinson-Patman Act as amended by the Nonprofit Institutions Act.[31]

The only opinions that have found the Robinson-Patman Act inapplicable where a government institution purchased goods for resale are two unpublished district court orders, *Portland Retail Druggists Association v. Abbott Laboratories,*[32] and *Mountain View Pharmacy v. Abbott Laboratories.*[33] Neither is persuasive. In neither case did the court consider or discuss the special factors present when a governmental body acts in direct competition with private businesses, and both decisions rely on authorities not applicable when the government is a competitor rather than consumer.

B. The Attorney General Opinions Cited By The District Court Do Not Address The Application Of The Robinson-Patman Act To Governmental Purchases For Resale.

The attorney general opinions cited by the District Court do not support its result. Some deal with sales to the federal government, which raise issues not applicable to state and local

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[31]Four other cases cited by the District Court involve purchases for consumption and contain only *dicta*. In two cases the *dicta* cut against the District Court's holding. For example, in Sterling Nelson & Sons v. Rangen, Inc., 235 F. Supp. 393, 399 (D. Idaho 1964), *aff'd*, 351 F.2d 851, 859 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966) (bribery of state officials in order to obtain government contracts), both the district court and court of appeals expressed skepticism about any policy exempting sales to states from the Robinson-Patman Act. And in Sperry Rand Corp. v. Nassau Research & Dev. Ass'n, 152 F. Supp. 91, 96 (E.D.N.Y. 1957), the court *refused* to dismiss a counterclaim alleging that sales to the U.S. Army Signal Corps violated § 2(a) of the Robinson-Patman Act.

[32]No. 71-543 (D. Or., Sept. 11, 1972) (unpublished spoken opinion), *vacated on other grounds*, 510 F.2d 486 (9th Cir. 1974), *vacated on other grounds*, 425 U.S. 1 (1976).

[33]No. C-77-0094 (D. Utah, Aug. 15, 1977) (unpublished order), *aff'd on other grounds*, 630 F.2d 1383 (10th Cir. 1980).

governments, and all involve governmental purchases for consumption. Thus none addresses the issue raised in this case.

The earliest opinion on this matter,[34] rendered by the Attorney General of the United States, did not consider states' purchases of goods for the purpose of resale in competition with private enterprises. In fact, the Attorney General considered only the applicability of the Robinson-Patman Act to the federal government. As discussed at note 18, *supra,* the Attorney General's statement of the principle of sovereign immunity – "that statutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided" – does not extend to state and local governments, particularly when they act in a proprietary capacity. And the Attorney General's second argument – that prices to the federal government seldom, if ever, would cause the competitive injury required to find a violation of the Robinson-Patman Act[35] – reinforces the fact that the opinion does not contemplate a situation involving competition with private enterprises, like the one presented in this case.

The same limited focus is also found in the other non-judicial opinions cited by the District Court: the 1962 statement of the Attorney General,[36] the 1973 decision of the Comptroller General,[37] and the opinions rendered by the state At-

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[34]38 Op. Att'y Gen. 539 (1936).

[35]The Attorney General also noted that discounts to the federal government are often based on the lower cost of doing business with the government, a justification which, as noted by the Attorney General of California, 1932-1939 Trade Cas. (CCH) ¶ 55,156 at 416 (1937), is expressly permitted by the Act.

[36]Report of the Attorney General Under Executive Order 10,936, Identical Bidding in Public Procurement 11 (1962).

[37]1973-2 Trade Cas. (CCH) ¶ 74,642.

torneys General of Minnesota,[38] Wisconsin,[39] and North Carolina.[40] These opinions generally fail to discuss or analyze the critical distinction between governmental purchases for consumption and those for resale. Where they do address the issue, they suggest that governmental purchases for resale be treated differently. As the North Carolina Attorney General commented:

> It must be remembered that the purpose behind enactment of the Robinson-Patman Act was to make price discrimination unlawful where it substantially lessened or prevented competition or tended to create a monopoly. *A state agency purchasing supplies for state needs is certainly not in competition with private business enterprise. Nor should lower prices to the state interfere with the normal price competition in sales to the general public.*

1977-2 Trade Cas. (CCH) at 73,309 (emphasis supplied). The North Carolina Attorney General recognized the distinction made by the Attorney General of Georgia, discussed in Section I.D. *supra,* noting that the State of Georgia had "entered the field of private enterprise by reselling its products to individuals and corporate dealers as well as other governmental units."[41] Again, this is the very type of conduct at issue in this case.

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[38]Opinion of Attorney General of Minnesota, 1932-1939 Trade Cas. (CCH) ¶ 55,157 (1937).

[39]Opinion of Attorney General of Wisconsin, 26 Op. Att'y Gen. Wis. 142 (1937) (purchase of commercial fertilizers for agricultural experiment stations).

[40]Opinion of Attorney General of North Carolina, 1977-2 Trade Cas. (CCH) ¶ 61,797 (1977).

[41]*Id.* The treatises cited by the District Court, 656 F.2d at 101, suffer from the same deficiencies as the cases which they summarize. They add no independent analysis, with the exception of one treatise that correctly notes that purchases for resale must be analyzed separately from purchases for consumption. *See* Rowe, *Price Discrimination Under the Robinson-Patman Act* 84 n.166 (1962).

III. THE ROBINSON–PATMAN ACT, AS APPLIED TO PURCHASES FOR RESALE BY STATE HOSPITAL PHARMACIES, REPRESENTS A LEGITIMATE AND PROPER EXERCISE OF CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE.

Although the District Court stopped short of holding that any application of the Robinson-Patman Act to state pharmacies would violate the Tenth Amendment, it identified what it believed to be "policy considerations" discussed in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that prohibit federal regulation of the prices paid by such pharmacies for drugs purchased for resale. 656 F.2d at 102.

It is important at the outset to recognize this argument for what it is: a frontal assault on any application of any federal antitrust law to any economic activity of a state or county hospital pharmacy, no matter how destructive of competition and no matter how unrelated to or inconsistent with state policies in the area. Under *National League of Cities*, a state's structuring of "integral operations in areas of traditional governmental functions" is immune from federal Commerce Clause regulation. 426 U.S. at 852. The suggestion that pricing policies of state and county pharmacies are "integral operations in areas of traditional governmental functions" would, if logically applied, exempt all state conduct related to their purchase and sale of drugs from liability under all antitrust laws.[42]

This Court has recently outlined the three stringent tests that must be satisfied before the Tenth Amendment will be held to limit congressional commerce power:[43]

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[42]Indeed, so treating purchases by state pharmacies of drugs for resale could displace all federal regulation, non-antitrust as well as antitrust, including federal laws concerning adulteration, misbranding, and prescription of drugs.

[43]Hodel v. Virginia Surface Mining & Reclamation Assn., 101 S. Ct. 2352, 2366 (1981) (emphasis in original) (citations omitted); United Transp. Union v. Long Island R.R., 50 U.S.L.W. 4315, 4317 (U.S. Mar. 23, 1982).

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." . . . Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." . . . And, third, it must be apparent that the States' compliance with federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

None of these tests is met in this case. Regulation of the respondent pharmaceutical companies and respondent Cooper Green Hospital[44] is clearly not regulation of the "States as States." Nor are resales of drugs in the public marketplace "attributes of state sovereignty." But it is principally the third prong of the *Hodel* test that a Tenth Amendment defense fails to meet. Purchases of drugs for resale by state hospital pharmacies are not an "integral operation" in an "area of traditional functions." Even if they were, application of the Robinson-Patman Act to such purchases would not impair, directly or indirectly, the ability of states to "structure" such purchases.

A. Application Of The Robinson-Patman Act To The Purchase Of Drugs For Resale By State Hospital Pharmacies Would Not Impair The States' Ability To Structure Integral Operations In An Area Of Traditional Function.

Viewed as it must be in the light most favorable to the plaintiff, the Complaint alleges that the defendant state and county hospital pharmacies are business enterprises engaged in com-

[44]Cooper Green appears to be a public corporation organized under Article of the Alabama Code and separate from the county itself. Section 22-21-178 of the Alabama Code provides, "No hospital authorized under this article [6] shall have governmental sovereignty or immunity," and section 22-21-182(e) provides, "All debts created . . . by the corporation shall be solely and exclusively an obligation of the corporation and shall not create an obligation or debt of the state of Alabama or of any county . . . ."

mercial competition in the retail sale of drugs in Jefferson County. The Tenth Amendment does not prohibit federal regulation of commercial enterprises run by state or local governments.[45]

Just as the operation of railroads "has traditionally been a function of private industry, not state or local governments" and is therefore subject to federal regulation, *Long Island Railroad,* 50 U.S.L.W. at 4317 (footnote omitted), so too is the operation of retail drugstores.[46] Like the railroads, interstate commerce in drugs has long been subject to substantial federal regulation. It is simply too late in the day to claim that Congress may not regulate the activity of a state when it acts in a proprietary capacity outside the sphere of its traditional governmental functions.[47]

Although some aspects of hospital services may be an integral portion of those services which the states have traditionally afforded their citizens, *National League of Cities,* 426 U.S. at 855,

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[45]A limited but useful analogy can be found in cases recognizing a "commercial activity" exception to the *Noerr-Pennington* doctrine, which recognizes that Congress intended the Sherman Act to reach anticompetitive conduct involving the government acting not in its political capacity but as a simple participant in the marketplace. Hecht v. Pro-Football, Inc., 444 F.2d 931, 941-42 (D.C. Cir. 1971). *cert. denied,* 404 U.S. 1047 (1972); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 31-34 (1st Cir.), *cert. denied,* 400 U.S. 851 (1970). Like antitrust analysis involving First Amendment concerns, antitrust analysis involving Tenth Amendment concerns can properly treat governmental political activities differently from governmental commercial activities.

[46]That NARD was founded in 1898 attests to the longstanding private nature of the retail prescription drug market.

[47]*See, e.g.*, California v. United States, 320 U.S. 577 (1944) (city and state are subject to federal shipping regulation); Union Pacific R.R. v. United States, 313 U.S. 450 (1941) (Section 1 of Elkins Act, an anti-price discrimination statute similar to Robinson-Patman Act, is applicable to cities); Ohio v. Helvering, 292 U.S. 360, 369 (1934) (whenever state engages in business of private nature, that business is not withdrawn from taxing power of nation).

the state cannot place a proprietary activity under the hospital umbrella and thereby immunize it from federal regulation. *See Long Island Railroad,* 50 U.S.L.W. at 4318; *Williams v. Eastside Mental Health Center,* 699 F.2d 671, 680 (11th Cir. 1982) (provision of mental health services to Alabama citizens is not integral governmental function). Retail sales of drugs to people who are not hospital patients are, by definition, by tradition, and by current practice, separate and independent from any traditional or integral state function regarding the provision of hospital care. Private pharmacies now account, and historically have accounted, for the major share of all drugs sold at retail.[48]

Even if the retail sale of drugs to nonpatients were part of the integral operations of an area of the states' traditional functions, application of the Robinson-Patman Act to discriminatory pricing of purchases by state pharmacies would not impair a state's ability to "structure" such operations. Requiring that purchases for resale be made at nondiscriminatory prices would have no impact on state or county treasuries,[49] nor would it force the state to restructure its purchasing operations, factors cited in *National League of Cities.*[50]

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[48]State and local government hospitals purchase approximately 4% of the pharmaceuticals sold, only a portion of which is resold at retail. See *supra* note 2.

[49]Nothing in the record suggests that the defendant pharmacies fail to pass the full purchase price of drugs on to retail customers or that they would fail to do so if they were to pay a higher, nondiscriminatory price.

[50]426 U.S. at 846-48. Even if this Court were to find that application of the Robinson-Patman Act to purchases for resale would impair a state's "ability to structure integral operations in areas of traditional functions," the state action doctrine of Parker v. Brown, 317 U.S. 341, 350-51 (1943), could, in proper circumstances, apply to action by a state as a state in its sovereign capacity. The availability of the *Parker* defense "makes it difficult to see how *National League of Cities* is even tangentially implicated" by imposing antitrust liability on anticompetitive activities not authorized by state policy. *City of Lafayette,* 435 U.S. at 413 n.42 (plurality opinion).

B. As Applied To Purchases Of Drugs By State And Local Government Pharmacies In Alabama For Resale, The Robinson-Patman Act Does Not Interfere With Any Clearly Expressed And Affirmatively Articulated State Policy.

Liability under the Robinson-Patman Act for price discrimination in governmental purchases for resale is not barred by the Tenth Amendment because no integral state function will be impaired. Even if any integral state function were affected, however, the Tenth Amendment protects only "considered policy choices" of the states acting in their sovereign capacity, *National League of Cities,* 426 U.S. at 848, or, using the terminology from antitrust cases involving the *Parker* doctrine, activities pursuant to a "clearly articulated and affirmatively expressed" policy of the state as a state. *City of Boulder,* 102 S. Ct. at 841. The State of Alabama has no policy, much less a clearly articulated and affirmatively expressed policy, to compel or even authorize price discrimination in purchases for resale by state or local agencies.

The only policy basis that the District Court identified for the challenged purchasing activities is Alabama's competitive bid law. That law is a typical governmental procurement statute designed to ensure that state and local agencies pay no more than, and *not* that they pay less than, the competitive price for the goods they purchase. That law basically requires that certain state and local agencies must use competitive bidding for certain purchases of supplies[51] and must accept the lowest responsible bid they receive.

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[51]It is not apparent from the record that the competitive bid law even applies to the purchases of drugs that are the subject of this lawsuit. Because there is no showing that all drugs purchased for resale are purchased in lots worth $2,000 or more or under circumstances where there are multiple sources, each of which is a prerequisite to the law's applicability, Ala. Code §§ 41-16-20, -21(a), -50(a), and -51(a)(10) (Michie Supp. 1981), the bid law cannot on this record be found to apply to every challenged purchase.

One searches the competitive bid law in vain for any articulation of any policy to compel or authorize purchases at *less* than competitive prices. To the contrary, "[w]hen the government acts under laws requiring competitive bidding, it signifies its intent to respond to the signals of a competitive market on the same terms as any other consumer . . . ." Surely the defendant drug manufacturers would not have violated any policy or law or become subject to any state sanctions if they had chosen to offer their goods to government pharmacies for a nondiscriminatory, competitive price. Indeed, a state's insistence on competitive bidding is inconsistent with authorizing its purchasing agents to act anticompetitively.[53]

The state competitive bid law is at most neutral with respect to price discrimination. "But plainly the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the [governmental] actions challenged as anticompetitive."[54] The courts have refused to interpret broad, general statutory grants of operating authority, like Alabama's competitive bid law, as state sanctions for anticompetitive behavior.[55]

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[52]George R. Whitten, Jr., Co. v. Paddock Pool Builders, Inc., 424 F.2d 25, 31 (1st Cir.), *cert. denied,* 400 U.S. 850 (1970).

[53]*See* 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 214 at 90 (1978).

[54]*City of Boulder,* 102 S. Ct. at 843 (emphasis in original); *see* Goldfarb v. Virginia State Bar, 421 U.S. at 791 (to be exempt, anticompetitive activities of state agency must be not merely "'prompted' by state action" but rather "compelled by direction of the State acting as a sovereign").

[55]*See* Duke & Co. v. Foerster, 521 F.2d 1277, 1281 (3d Cir. 1975) (no implied statutory authority that "mandates or permits discrimination against certain suppliers"); Corey v. Look, 641 F.2d 32, 37 (1st Cir. 1981) (authority to purchase and operate parking lots "simply empowers the [defendant state agency] to behave as an ordinary economic agent," but does not empower it to engage in commercial boycotts); *cf.* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706-07 (1962) (argument that company was acting as agent of Canadian law states no defense to antitrust claim because

The Tenth Amendment was not intended to protect actions not taken pursuant to a clearly articulated sovereign state policy. To exempt the defendant state and local government pharmacies from liability under the Robinson-Patman Act on the basis of this record would further no demonstrated interest of the State of Alabama and would undermine a substantial federal interest in the vigorous enforcement of the antitrust laws and the competitive operation of the interstate market in drugs.

IV. CONCLUSION

The decision of the Court of Appeals permits state hospitals to obtain discriminatory price concessions from pharmaceutical manufacturers and to use that advantage in retail competition with independent pharmacists. This anticompetitive price advantage is prohibited by the Robinson-Patman Act, which extends to all "persons," a term this Court explicitly has applied to state governments.

The legislative history of the Robinson-Patman Act confirms that the Act means what it says: its author explained that the Act would apply to purchases by state hospitals for resale in competition with other parties. Congress' intent was further demonstrated two years after passage of the Robinson-Patman Act when it narrowed the original Act by exempting purchases by nonprofit institutions of "supplies for their own use"; the amendment's sponsor made unmistakably clear the congressional intent to include within its scope hospitals operated by state, county, and city governments. Congress would not have included governmental entities within this limited exemption if they were already categorically exempt from the provisions of the Act.

"[t]here is nothing to indicate that such law in any way compelled discriminatory purchasing").

This Court on numerous occasions has refused to find implied exemptions to the antitrust laws. It recently reaffirmed that the antitrust laws apply to health care.[56] It has enforced Congress' intent that the antitrust laws apply by their terms, that they be broadly construed, and that special exceptions not be carved out. There is no policy reason to change that view in this case by constructing a *per se* exemption for state hospitals when they engage in proprietary activities in competition with retail druggists and private hospitals. Congress did not intend or provide such an exemption, and there is neither justification nor need for the courts to create one. Retail druggists should not be forced to compete on unfair terms against state hospitals that can use their superior bargaining position to obtain more favorable prices – the very evil the Robinson-Patman Act was intended to prevent. State government is entitled to no special antitrust immunity when it undertakes commercial activities in competition with private enterprises.

The dissenting opinion below of Judge Clark aptly summarizes what is involved in this case:

> [t]he decision permits the six states of this circuit and their agencies to unfairly compete with private enterprises operated by their citizens in the retail sale of goods. A state's size gives it great purchasing power and thus an awesome competitive advantage over private business. To this the court adds the advantage of a license to make use of price discrimination in its wholesale purchases.
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> * * * *
>
> Instead of creating an exemption to the statute, I would follow the policy underlying the antitrust laws. I would hold that, for the purposes of the Robinson-

[56]National Gerimedical Hospital and Gerontology Center v. Blue Cross, 452 U.S. 378 (1981); *see also* Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976).

> Patman Act, when a state moves outside its traditional sphere of activity and into retail competition with private enterprise, it should be treated in precisely the same manner as its competitors. Today's decision subverts the policy behind the Robinson-Patman Act. It subjects businessmen, who suddenly have found themselves in competition with pharmacies owned by the State of Alabama, to the unfortunate effects of unfair competition without affording them a remedy. This result is not only inequitable, it is in direct conflict with the language and major thrust of the Act.

656 F.2d at 93-94.

WHEREFORE, the National Association of Retail Druggists respectfully urges this Court to reverse the judgment of the U.S. Court of Appeals for the Eleventh Circuit and to hold that purchases of drugs by hospital pharmacies that are owned by a state or subdivision thereof are exempt from the Robinson-Patman Act only to the extent they are made for the hospital's own use, as provided in 15 U.S.C. § 13c.

Respectfully submitted,

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April 22, 1982

Docket Sheet

NO. 81-827-CFX	TITLE Jefferson County Pharmaceutical Association, Inc., Petitioner v. Abbott Laboratories, et al.

DOCKETED	COURT
Oct. 30, 1981	United States Court of Appeals for the Fifth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Joe L. Tucker, Jr., Allen W. Howell
	Counsel for Respondents: L. Murray Alley, Jr., James L. North, William H. Mills, M. R. Nachman, Jr., Duncan Y. Manley, Ina B. Leonard, John J. Coleman, Jr. (Over)
Oct. 30, 1981	Petition for writ of certiorari filed. (Record filed)
Dec. 2, 1981	Brief for respondent Abbott Laboratories, et al., in opposition filed.
Dec. 2, 1981	DISTRIBUTED. 1-8.
Dec. 7, 1981	Brief of the Board of Trustees of the University of Alabama in opposition filed. (D).
Jan. 12, 1982	REDISTRIBUTED. 1-15.
Feb. 8, 1982	REDISTRIBUTED. 2-19.
Feb. 23, 1982	REDISTRIBUTED. 2-26.
Mar. 2, 1982	REDISTRIBUTED. 3-5.
March 8, 1982	Petition GRANTED. O'Connor, J., OUT.

Apr. 22, 1982	Joint appendix filed.
Apr. 22, 1982	Brief for the petitioner filed.
Apr. 22, 1982	Brief, amicus curiae, of The National Association of Retail Druggists filed.
Apr. 22, 1982	Motion of American Pharmaceutical Association for leave to file a brief as amicus curiae filed.
May 3, 1982	The motion of American Pharmaceutical Association for leave to file a brief as amicus curiae is GRANTED. O'Connor, J., OUT.
May 6, 1982	Motion of respondent Board of Trustees of the University of Alabama for divided argument and for additional time for oral argument filed.
May 19, 1982	Order extending time for ALL RESPONDENTS to file their briefs on the merits until June 3, 1982.
May 24, 1982	The motion of respondent Board of Trustees of the University of Alabama for divided argument and for additional time for oral argument is DENIED. O'Connor, J., OUT.
May 26, 1982	Brief for respondents Abbott Laboratories, et al. filed.
June 3, 1982	Brief, amicus curiae, of The National Association of Counties in support of respondents filed. (Over)

81-827

Title

No.

DATE	PROCEEDINGS AND ORDERS
	Counsel for petitioner:
	Counsel for respondents: William G. Somerville, Jr. James C. Barton, Robert F. Ward, David Klingsberg, John Bingham, A. J. Noble, Jr., E. Mabry Rogers, Linda Friedman,
June 5, 1982	Brief of respondent, The Board of Trustees of the University of Alabama filed.
July 13, 1982	CIRCULATED.
Oct. 29, 1982	Reply brief of petitioner filed. (D).
Nov. 8, 1982	ARGUED.